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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

OF THE

STATE OF MISSOURI

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

November 12, 1912 to December 3, 1912.

BY THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

November 25, 1912 to March 3, 1913.

BY JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

January 6, 1913 to March 3, 1913.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1912.

(Continued from Volume 167)

BEN B. THORNTON, Respondent, v. CHARLES V. MERSEREAU, Appellant.

St. Louis Court of Appeals, November 12, 1912.

1. **APPELLATE PRACTICE: Conclusiveness of Verdict.** A verdict rendered on conflicting evidence is conclusive, on appeal.

2. **MASTER AND SERVANT: Contract of Employment: Evidence.** Where, in an action for services rendered, the issue was whether there was a contract of employment between plaintiff and defendant, the testimony of a witness that he was in defendant's office with plaintiff and was a party to a conversation between them in which defendant agreed to give plaintiff and the witness each a specified sum per week as expense money, was admissible to prove the existence of a contract of employment between plaintiff and defendant.

3. **INSTRUCTIONS: Covering Whole Case: Ignoring Theory of Either Side.** An instruction which is intended to cover the whole case should cover defendant's side of the case as well as plaintiff's.

4. **PARTNERSHIP: How Established: Question for Court or Jury.** The fact of partnership is a matter for determination by the jury, if there are facts in evidence warranting a verdict to that effect; it being the province of the court, however, to determine whether or not there is such evidence.

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5. ———: ———: **What Constitutes: Participating in Profits and Losses.** The determination of the question of whether a contract is one of partnership depends upon the evidence, but mere participation in the profits and losses does not necessarily constitute a partnership between the participating parties.

6. **INSTRUCTIONS: Covering Whole Case: Ignoring Defense.** In an action for services rendered, where plaintiff offered evidence tending to prove an employment and the rendition of services thereunder and their value, while defendant offered evidence tending to prove that he and defendant were partners in the work, an instruction given for plaintiff, intended to cover the whole case, which authorized a recovery if the jury found that the parties entered into an agreement whereby plaintiff was to perform the services, that plaintiff performed them, and that they were of value, was erroneous for failing to cover the issue of whether or not the parties were partners. [REYNOLDS, P. J., dissents.]

7. **APPELLATE PRACTICE: Binding Effect of Theory at Trial: Trial Practice: Partnership.** In an action for services rendered, where evidence offered by plaintiff, tending to prove a partnership between the parties for the performance of the work sued for, is received without objection by defendant, the defense of partnership will be considered, although defendant's answer is merely a general denial.

8. **MASTER AND SERVANT: Action for Services: Instructions.** In an action on a *quantum meruit* for services rendered, defended on the theory that plaintiff and defendant were partners in the work, defendant requested an instruction charging that if the jury believed the services sued for were performed under an agreement between plaintiff and defendant, and that defendant "did not, under such agreement, agree to pay plaintiff a salary for all or any part of such services, then plaintiff is not entitled to recover." *Held*, that it was proper to refuse the instruction, since it would have been error to have charged that plaintiff could not recover for "all or any part" unless defendant had agreed to pay plaintiff for all or any part, as plaintiff certainly was entitled to recover for such part of the services as he proved he had rendered.

Appeal from St. Louis County Circuit Court.—*Hon. G. A. Wurdeman*, Judge.

REVERSED AND REMANDED.

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Lee A. Hall for appellant.

(1) One partner cannot sue another in an action at law until a settlement has been made between them of the partnership affairs, even on a special agreement to pay salary. Richardson v. Bank, 4 My. & Cr. 165; Gaskell v. Spence, 83 Mo. App. 380. (2) The testimony of the witness Hempleman should not have been admitted, and on defendant's motions should have been stricken from the record. (3) (a) A single instruction offered by plaintiff covering his whole case must not ignore any material defense of defendant. Link v. Westerman, 80 Mo. App. 592; Quirk v. Elevator Co., 126 Mo. 279; Borden v. Folk Co., 97 Mo. App. 566; Meyers v. Realty Co., 96 Mo. App. 625; Maccaully v. Greenwood, 127 Mo. 138; Scanlon v. Gulich, 199 Mo. 449; Evans Gardner Cul. Co. v. Railroad, 64 Mo. App. 305. (b) Plaintiff suing in his second count on the theory of "*quantum meruit*," cannot recover on the theory of "an agreement" performed. Clements v. Yates, 69 Mo. 623; Cole v. Armour, 154 Mo. 333. (c)Instructions should be addressed to the specific count they are intended to cover. Bailey v. Gas Fixture Co., 54 Mo. App. 50. (d) Defendant's instruction No. 6 should have been given. Phelan v. Paving Co., 115 Mo. App. 423. (4) The verdict and judgment should have been for defendant. Richardson v. Bank, 4 My. & Cr. 165. (5) Plaintiff's undisputed conduct and actions and his evidence are so wholly inconsistent with his alleged contract for salary as to demonstrate that the verdict was the result of passion, prejudice and sympathy. Spohr v. Railroad, 87 Mo. 74; Walton v. Railroad, 49 Mo. App. 620; Garrett v. Greenwell, 92 Mo. 120.

Geo. B. Logan for respondent.

(1) Appellant's first point, that one partner cannot sue another in an action at law is correct in the

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abstract, but not applicable to this case, since there was no evidence in this case tending to prove such a partnership as the appellant contemplates. (a) An agreement between two persons whereby they are to share the profits of a venture does not of itself constitute a partnership in such venture. The necessary incidents of a partnership are a sharing of the profits, a sharing of the losses, a joint ownership of the partnership property, and a joint management of the partnership business. Campbell v. Dent, 54 Mo. 325; Bank v. Outhwaite, 50 Mo. App. 124; Deyerle v. Hunt, 50 Mo. App. 541. (b) Statements of plaintiff's witnesses, or even of the plaintiff himself, that he was a partner might tend to create a partnership to such an extent as to render him liable to third persons, but to create a partnership *inter sese,* the intention of the parties is the essential factor. Deyerle v. Hunt, supra. (2) Testimony of witness Hempleman was fully admissible to prove the contract between the plaintiff and defendant as he was present when it was concluded. Hempleman was not a party to the contract between plaintiff and defendant, for the contract between plaintiff and defendant was carried out by plaintiff for defendant entirely without Hempleman. (3) Plaintiff's instruction A was proper, and defendant was not entitled to have his theory of the case presented, for: (a) An instruction should not include issues not raised by the pleadings, nor supported by the evidence. State ex rel. Robertson v. Hope, 102 Mo. 410; Kingman Co. v. Cornell-Tebbetts, 150 Mo. 281; Wann v. Scullin, 210 Mo. 429. (b) Nor should an instruction be given when there is evidence to support it if this evidence is improperly admitted, even though without objection. 38 Cyc. 1625-60; Weaver v. Hendrick, 30 Mo. 502. (4) Plaintiff's point 3 is not well taken, for it is not the law in this State. (a) It is the established law in this State that when a contract has been fully performed and nothing re-

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mains to be done but to pay the stipulated price, the party performing may abandon the contract in his pleadings and sue in *indebtitatus assumpsit* for *quantum meruit*. Dempsey v. Lawson, 76 Mo. App. 522; Barnett v. Sweringen, 77 Mo. App. 64; Keith v. Moore, 146 Mo. 90. (b) In such cases the plaintiff does not reject or abandon the contract, but on his count on *quantum meruit* offers the contract as evidence to sustain his case. Williams v. Railroad, 112 Mo. 468; Yeats v. Ballentine, 56 Mo. 535. (c) A breach of an express contract by defendant will permit plaintiff to recover on a *quantum meruit* the value of the services rendered, the contract price limiting the recovery. Moore v. Gauss, 113 Mo. 98; Brierre v. Sugar Co., 102 Mo. 622. (5) Defendant's instruction No. 6 was properly refused, as there was no evidence properly before the jury on which this instruction could have been predicated. Defendant's whole case was that plaintiff and defendant were partners. This should have been specially pleaded and evidence thereon should not have been admitted. (a) Where a defense is affirmative, all the facts necessary to constitute a full defense should be fully set out, and this rule applies to cases in equity as well as in law. Reynolds v. Reynolds, 45 Mo. App. 622; Guinotte v. Ridge, 46 Mo. App. 254. (b) If the defendant rests his defense on any fact not necessary to support the plaintiff's case, he must set it out in ordinary precise language or he will be precluded from giving evidence of it at the trial. Musser v. Adler, 86 Mo. 445; Guinotte v. Ridge, supra.

REYNOLDS, P. J.—The petition in this case as originally framed consisted of four counts. The first and fourth were abandoned at the trial, and while there was a verdict for plaintiff on the third count, he remitted all of that verdict so that the only count necessary for consideration is the second. That states

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that plaintiff entered into the service of defendant, at the request of defendant, and served as superintendent of construction of certain construction work, the work being the construction of certain alleys in the city of St. Louis and the construction of certain abutments in St. Louis county of a railroad; that he was engaged in the work for thirty-three and one-half weeks, with the exception of three weeks; that the reasonable value of the services was twenty-five dollars per week, making a total of $833.33 and that the only money he had been paid as compensation for his work amounted to $175.25. Judgment was demanded for the difference.

The answer was a general denial.

The jury returned a verdict in favor of plaintiff on the second count for $500, and on the third count for fifty dollars, but under a motion for new trial filed by defendant, plaintiff remitted $175 of the verdict as to the second count and all of the amount returned on the third count. Judgment followed, defendant filing motions for new trial and in arrest, saving exception to the overruling of these, has duly perfected his appeal to this court.

The evidence of plaintiff as to the second count tended to show that he had an agreement with defendant as to superintending the doing of the work mentioned in the petition and that he was to receive a certain sum per week, also another sum as board money, and to have a share in the profits of the contracts under which the work was to be done; that defendant had failed to keep the contract.

Appellant makes six assignments of error here. First, to the refusal of an instruction in the nature of a demurrer to the evidence under the second count, asked at the close of plaintiff's evidence and of the whole case. Second, to error in the admission of certain evidence offered by plaintiff, it being contended that it was improper, incompetent, irrelevant and im-

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material; and third, error of the court in giving an instruction at the instance of plaintiff and in refusing an instruction asked by defendant. Fourth, that the verdict and judgment is for the wrong party. Fifth, that it is the result of passion, prejudice and sympathy, and finally for the error of the court in overruling defendant's motion for new trial and his motion in arrest.

Taking these up in their order, we cannot agree, even on the showing made by counsel for defendant, that the demurrer to the evidence under the second count of the petition should have been sustained. There was evidence given on the part of plaintiff in support of that count and while the testimony of the witnesses for plaintiff and defendant was very contradictory over this, its determination was for the jury and their finding is conclusive. Counsel under this assignment argues that plaintiff's testimony is not entitled to belief. That matter was distinctly submitted to the jury by the instruction given at the instance of appellant, that if the jury believed from the evidence that any witness had wilfully sworn falsely to any material fact, the jury was entitled to reject the testimony of that witness. The jury was further told by an instruction asked by appellant, that the burthen of proof was on plaintiff and that he must prove his case by the greater weight of the evidence, and if the jury found from the evidence that plaintiff had failed to prove his case as to any one or more counts of his petition by the greater weight of the testimony, their verdict should be for defendant as to such count or counts. So that we rule the first assignment of error against appellant.

The second assignment as to the admission of improper evidence is founded on evidence given by a certain witness, who testified that he was in appellant's office with respondent, was a party to the conversation between them, and in that conversation de-

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fendant had agreed to give plaintiff and witness two dollars a week each as expense money. Defendant objected to this and moved to strike out the evidence of the witness "because it is not shown that that contract was ever carried out;" that plaintiff's evidence shows that this witness never became a party to any of this transaction at that time, and further that what the witness testified to was a conclusion, and counsel moved to have it stricken out. Counsel for appellant argues that it is apparent that if there was an agreement made between plaintiff, defendant and this witness, that contract, so far as the witness was concerned, was never carried out, and the fact that a contract of this character may have been made, to which the witness was a party and which is shown by his own testimony and that of plaintiff had never been carried out, is not admissible to prove and does not tend to prove that there was a contract between plaintiff and defendant, as the witness had testified that they were wholly unsuccessful in getting work and that he (witness) quit. There is no pretense that the contract between the witness and plaintiff on the one hand was a joint contract between them and defendant, so that while it was immaterial whether the witness had carried it out or not, his testimony was most clearly relevant, material and competent as tending to prove the contract on behalf of plaintiff with defendant. That error assigned is not tenable.

The third assignment of error relates to the giving of an instruction at the instance of plaintiff and the refusing of one asked by defendant. The instruction given at the instance of plaintiff, of which complaint is made, in substance, is as follows: That if the jury found from the evidence that plaintiff and defendant entered into an agreement whereby plaintiff was to perform services for defendant in the capacity of foreman of construction, and that plaintiff did in fact perform such services and such services

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were of value, then the jury will find for plaintiff for the reasonable value of such services as they may believe from all the evidence in the case plaintiff may be entitled to. It is urged against this instruction that it undertakes to cover the whole case and omits all reference to the defense set up by appellant. The defense pleaded was a general denial. At the trial defendant, appellant here, undertook to prove that in point of fact plaintiff was a partner with him in the work of construction, payment for which is the basis of the action.

It is the duty of the court, when undertaking to instruct on the whole case, to cover not only the plaintiff's side of it but that of the defendant. Plaintiff testified that he and defendant were partners in the matter, defendant denying partnership and claiming an interest in profits only, which he testified had not been paid him, hence his action on *quantum meruit*. The fact of partnership is a matter for the determination of the jury, if there are facts in evidence authorizing a verdict to that effect (McDonald v. Matney, 82 Mo. 358); and the character of the contract between the parties is to be deduced from the evidence (Torbert v. Jeffrey, 161 Mo. 645, l. c. 654, 61 S. W. 823); and it is for the court to determine whether there is such evidence before the jury as will entitle them to find partnership. [Edgell v. Macqueen, 8 Mo. App. 71, l. c. 76; Carson et al. v. Culver et al., 78 Mo. App. 597, l. c. 603.] "A mere participation in the profits and loss does not necessarily constitute a partnership, between the parties so participating," says our Supreme Court in McDonald v. Matney, supra, l. c. 365, citing and quoting from several cases. [See also Torbert v. Jeffrey, supra, and Nugent v. Armour Packing Co., 208 Mo. 480, l. c. 487, *et seq.*, 106 S. W. 648.] With this evidence in the case, the majority of our court hold that the trial court, in undertaking to instruct on the whole case, should have covered this issue. 1

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do not agree to that. Counsel for respondent argues that as there was no plea of partnership, the answer being a general denial, that the evidence as to partnership should have been disregarded. Whether it should have been pleaded is not necessary to decide, as the evidence concerning it went in without objection.

Appellant complains of the refusal of the court to give an instruction asked by him which, in substance, told the jury that if it believed from the evidence that the services mentioned in the second count of the petition were performed under an agreement between plaintiff and defendant and that defendant "did not under such agreement mentioned in these instructions, agree to pay plaintiff a salary for all or any part of such services, then plaintiff is not entitled to recover on the second count of his petition, and your verdict on such count will be for defendant." This instruction is not correct and should not have been given in the form asked; it would have been error to say that plaintiff could not recover for "all or any part," unless defendant had agreed to pay plaintiff for all or any part, for the plaintiff surely was entitled to recover for that part of the services he might have proved he had rendered.

The above assignments are the material ones. As the judgment will be reversed and the cause remanded, it is unnecessary to consider the assignment as to the amount of the verdict.

We find no suggestion whatever in the argument of counsel for appellant even tending to show why the motion in arrest of judgment should be sustained.

For error in the first instruction, in that it fails to cover the whole case, while purporting to do so, the majority of the court are of the opinion that the judgment should be reversed and the cause remanded. It is so ordered.

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W. T. MURPHY, Respondent, v. LORWOOD COOPERAGE COMPANY, Appellant.

St. Louis Court of Appeals. Submitted on Briefs October 9, 1912. Opinion Filed November 12, 1912.

1. **PLEADING: "Answer" to Reply.** An "answer" to a reply is unknown under the Code; Sec. 1811, R. S. 1909, providing that the reply shall be the last pleading in a cause.

2. **BILLS OF EXCEPTIONS: Verity: Not Impeachable by Affidavits.** Where the trial judge refused to sign a bill of exceptions tendered to him, on the ground that it incorrectly recited that an exception was saved to the order overruling the motion for a new trial, and the bill, as signed by him and filed of record, contained no such exception, an affidavit made by counsel for the party who filed the bill, which was not filed with the trial court but was merely inserted in the abstract of the record filed by him in the appellate court, that he had duly saved such exception, did not have the effect of correcting the bill or supplying such exception; Secs. 2030, 2031 and 2034, R. S. 1909 providing the only mode of bringing a bill of exceptions before an appellate court where the trial judge refuses to sign it on the ground it is not a true bill.

3. ———: ———: ———. Affidavits contradicting a bill of exceptions which has been regularly signed and filed cannot be regarded.

4. **APPELLATE PRACTICE: Review of Matters of Exception: Prerequisites.** Unless an exception to the order overruling the motion for a new trial appears in the bill of exceptions, all inquiry into the proceedings at the trial is closed to the appellate court, and only the record proper is open to review.

Appeal from New Madrid Circuit Court.—*Hon. Henry C. Riley,* Judge.

AFFIRMED.

Brown & Gallivan for appellant.

(1) The affidavit showing appellant's inability to get bill of exceptions signed and that exceptions were made to action of the court in overruling motion for new trial is sufficient to warrant the court in trying the whole case. State v. Feely, 194 Mo. 315.

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Brewer & Riley for respondent.

(1) The bill of exceptions in this case is not for review before this court for the reason that it fails to show that appellant excepted to the action of the court in overruling the motion for a new trial. Danforth v. Railroad, 123 Mo. 196; R. S. 1909, Sec. 2028; Wilbrandt v. Gas Light Co., 135 Mo. App. 220; Perry v. Stephens, 159 Mo. App. 690. (2) The affidavit of T. J. Brown does not authorize this court to review the matters and things set out in the bill of exceptions, for affidavits are authorized only after the court refuses to permit the filing of the bill signed by bystanders. Sec. 2034, 2035, 2036, 2037, R. S. 1909; State ex rel. Winsor v. Taylor, 134 Mo. App. 430; McKinney v. Lumber Co., 131 Mo. App. 425.

REYNOLDS, P. J.—This action, brought in the circuit court of New Madrid county, seeks the recovery of a balance claimed to be due from defendant to plaintiff on the sale of certain timber then standing on lands in that county, to be cut into logs by plaintiff and the logs to be delivered at a price designated f. o. b. cars at a railroad switch in the county, it being charged that the amount was due when the logs were loaded by plaintiff on the cars at that place. It is averred that plaintiff cut and hauled a designated number of feet of the timber as described into logs, and loaded the logs on cars as required; that defendant received and paid for one of the carloads of logs but refused to receive or pay for the other two cars and notified plaintiff that no more of the timber would be received by it. Claiming a balance due, plaintiff demands judgment for that, with interest and costs.

The answer was, first, a general denial; then a denial of the incorporation of the plaintiff company, the answer duly verified. The reply took issue on this and also pleaded that at the time of the agreement

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mentioned in the petition, a person named represented to plaintiff that defendant was then an organized corporation; but that it was afterwards organized and had then ratified the contract made in its name. Defendant moved to strike out this reply on the ground that it was a departure. That motion being overruled, defendant filed what its counsel call "an answer to the replication."

The jury returned a verdict in favor of plaintiff. Defendant in due time filed its motion for a new trial. That was overruled, but so far as shown by the abstract of the bill of exceptions and, as admitted by counsel, so far as appears by the bill of exceptions which was filed, no exception was saved to the action of the court in overruling the motion for a new trial. Plaintiff in due time filed a motion in arrest of judgment. That was overruled and exception saved to the overruling of that motion. Defendant thereupon duly perfected appeal to this court.

It is hardly necessary to refer to the pleadings or attempted pleadings, following the reply. Our code specifically provides that the reply is the last pleading in a cause, that, of course, subject to a motion to strike it out or to a demurrer, as to any other pleading. An answer to a reply is unknown under our code.

Counsel attempt to cure the omission from the bill of exceptions of any exception to the action of the trial court in overruling the motion for a new trial by an affidavit made by one of those counsel, to the effect that he assisted in conducting the trial, that he prepared and filed the motion for new trial, presented it to the court, was there when the court overruled it and excepted to the action of the court in overruling the motion; that he prepared the bill of exceptions in the cause and presented the same to the attorney for respondent for approval; that that attorney refused to approve it for the reason that the record made by the clerk did not show that the appellant excepted to the

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action of the court in overruling the motion for new trial; that he presented the bill of exceptions to the judge of the circuit court for his signature and that that judge refused to sign the bill of exceptions containing an exception of appellant to the action of the court in overruling the motion for new trial, because the record did not show any exception to his action in overruling the motion, and that the attorneys for respondent still refused to approve the bill of exceptions, compelling "appellant to file said bill of exceptions without their exception to the action of the court in overruling said motion for new trial therein noted."

It is thus distinctly admitted in this affidavit of counsel that the bill of exceptions does not show any exception to the action of the court in overruling the motion for new trial, and that the trial court refused to sign any bill of exceptions containing any statement that exception had been saved to the action of the court on the motion, but did sign what the court has certified to be a correct bill of exceptions and which counsel for appellant themselves filed as the bill of exceptions in this case. This affidavit of counsel appears printed in the abstract, there following the certificate of the clerk of the circuit court to the transcript. How it came into the abstract does not appear. It nowhere appears that it was filed in the circuit court, or for that matter that it was ever filed with any court, unless incorporating it at the end of the abstract may be considered as filing it with us.

In support of this mode of attack upon the bill of exceptions, counsel rely upon State v. Feeley, 194 Mo. 300, l. c. 315, 92 S. W. 663. In that case it is said at that page, "Matters of exception which occur in the presence of the court cannot be shown by affidavits, unless the court refuses to sign the bill when presented to him upon the ground that the matters therein stated, or some of them, are not true," citing several

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cases. This is very far from sustaining the contention of counsel, that a bill of exceptions can be amended as here attempted. The affidavits referred to by the court in the Feeley case and cases there cited as being necessary are undoubtedly affidavits required to be filed in the trial court when the judge refuses to permit a bill of exceptions signed by bystanders to be filed. [Sec. 2034, R. S. 1909.] If the trial judge refuses to sign a bill of exceptions on the ground that it is not a true bill, sections 2030, 2031, 2034, Revised Statutes 1909, provide the mode and the only mode for meeting the situation and bringing the bill before the appellate court. One is, by preparing and filing a bill of exceptions to be signed by three bystanders, "reputable inhabitants of the State." The other is, if the judge refuses to permit the bill so signed to be filed, then the truth of that bill is tested by affidavits, not exceeding five; the bystanders or affiants to be disinterested spectators and not the parties in interest or their attorneys. [State v. Jones, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556.] Nor can affidavits in contradiction of a bill of exceptions which has been regularly signed and filed be regarded. [State v. DeMosse, 98 Mo. 340, 11 S. W. 731.] It is true these two cited cases are criminal causes, but as said in State v. Jones, supra, "bills of exceptions are procured in the same way, whether the cause be civil or criminal." No such course was here followed, so that we can do no less than accept the bill of exceptions which was filed as correct, and to hold that exception was not saved to the action of the trial court in overruling the motion for a new trial.

The Supreme Court, in very many cases and from an early day, has uniformly held that unless that exception appears of record, all inquiry into the proceedings at the trial is closed to the appellate court. [See Parsons v. Clark & Co., 98 Mo. App. 28, 77 S. W. 582, and cases there cited.] Bound by the deci-

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sions of the Supreme Court there cited, by express mandate of the Constitution, we are compelled to hold that by reason of this purely technical defect in the record all consideration of this case on its merits is closed to us. All that is open to our examination and review is the record proper. Finding no error in that, we must and do affirm the judgment of the circuit court. *Nortoni* and *Caulfield, JJ.*, concur.

STELLA ANGEL, Respondent, v. CITY OF PORTAGEVILLE, Appellant.

St. Louis Court of Appeals. Submitted on Briefs October 9, 1912. Opinion Filed November 12, 1912.

1. **BILLS OF EXCEPTIONS: Verity: Not Impeachable by Affidavits.** Where a bill of exceptions, as filed, did not show an exception to the order overruling the motion for a new trial, such exception could not be supplied by affidavits of counsel for the party who filed the bill that it had been duly saved by them and that the trial court refused to settle and sign a bill tendered by them, showing it; following Murphy v. Cooperage Co., *ante*.

2. **APPELLATE PRACTICE: Review of Matters of Exception: Prerequisites.** Unless an exception to the order overruling the motion for a new trial appears in the bill of exceptions, all inquiry into the proceedings at the trial is closed to the appellate court, and only the record proper is open to review.

3. **PLEADING: Demurrer: Waiver by Answering Over.** By answering over after his demurrer to the petition has been overruled, defendant loses the benefit of the demurrer, save as to the lack of jurisdiction of the court over the subject-matter or the failure of the petition to state facts sufficient to constitute a cause of action. [See Sec. 1804, R. S. 1909.]

4. **APPELLATE PRACTICE: Review: Motion in Arrest: Necessity of Exception.** A motion in arrest of judgment cannot be availed of on appeal, unless an exception was saved to the order overruling it.

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5. ———: **Questions Reviewable: Pleading: Sufficiency of Petition.** The objection that a petition does not state facts sufficient to constitute a cause of action may be raised for the first time on appeal.

6. ———: ———: **Pleading: Sufficiency of Petition: Waiver of Defects by Verdict.** However defective a petition may be, if the necessary facts can be implied from what is defectively stated, the defendant will not be heard to object, after verdict and judgment, on the ground that the petition will not sustain a judgment; such objection being available only when the petition entirely fails to state a cause of action.

7. **PLEADING: Defective Petition: Aider by Answer.** Defective allegations of a petition may be supplied by the averments of the answer.

8. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Pleading: Sufficiency of Petition: Aider by Answer.** In an action against a municipal corporation for personal injuries sustained on a defective sidewalk, *held* that the petition, when construed, as it should be, with defendant's answer, states a cause of action, warranting the verdict and supporting the judgment for plaintiff.

Appeal from New Madrid Circuit Court.—*Hon. Henry C. Riley,* Judge.

AFFIRMED.

S. J. Smalley and *Brown & Gallivan* for appellant.

(1) The court should have sustained defendant's demurrer to plaintiff's petition, as the petition does not state the character of the defect in the sidewalk, does not state that the sidewalk was dangerous, or unsafe, nor does it state that the injury complained of was caused by the defective sidewalk. Plummer v. City of Milan, 70 Mo. App. 598; Young v. Kansas City, 45 Mo. App. 602 (2) The bill of exceptions in this case does not show the defendant excepted to the action of the court in overruling its motion for new trial and motion in arrest. On pages 28, 29 and 30 of appellant's abstract are the affidavits of the appellant's

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attorneys at the trial showing exceptions at the time to the action of the court, and further showing that appellant was unable to get its bill of exceptions signed by the court who tried the case. We therefore submit that this case should be tried by this honorable court under the ruling in State v. Feeley, 194 Mo. 315.

Ward & Collins for respondent.

(1) None of the assignments of errors can be considered on appeal because the record fails to show that an exception was saved to the overruling of the appellant's motion for a new trial and none of the grounds assigned by said motion can be reviewed. State v. Harris, 216 Mo. 392; State v. Parnell, 206 Mo. 723. (2) With nothing before this court for review appellant's complaints cannot extend beyond respondent's petition. While this petition could have charged more specifically the place on the sidewalk where respondent was injured, and could have by direct averment fixed the place of injury to have been the deep hole in the sidewalk mentioned in the second paragraph in the petition, yet the authorities are legion that this petition is good after verdict. It will not be said that this petition states no cause of action at all. The most that can be stated against this petition is that it defectively states a cause of action. Nowell v. Mode, 132 Mo. App. 237; Malone v. Insurance Co., 71 Mo. App. 1; Bank v. Leyser, 116 Mo. 51. (3) Respondent in her petition complains of a certain defect in a certain sidewalk along a certain lot in appellant city, and then charges that the appellant negligently conducted itself with reference to this certain and pointed out defect and place in said sidewalk, and then charges that while respondent so passing along this sidewalk, she slipped, fell and was injured, and while it is not expressly averred that the hole and defect in the sidewalk complained of caused respondent to slip and fall, yet it is necessar-

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ily and strongly implied from what is stated therein. Scammel v. Transit Co., 103 Mo. App. 513; Groves v. City, 75 Mo. 672; Vava v. Kansas City, 51 Mo. 454; Elport v. Seiler, 54 Mo. 134; Spurlock v. Railroad, 93 Mo. 538; Burthold v. Insurance Co., 2 Mo. App. 311; State v. County Court, 51 Mo. 522; Roper v. Clay, 18 Mo. 383; Shaler v. Van Wormer, 33 Mo. 386; Jones v. Lauderman, 39 Mo. 287; Falls v. Daily, 74 Mo. 74; Cobb v. Railroad, 149 Mo. 135; Heman v. Allen, 156 Mo. 534; Buck v. Railroad, 46 Mo. App. 555; Murphy v. Insurance Co., 70 Mo. App. 78. (4) Even to concede that respondent's petition is not as well as it might have been, yet the appellant in its answer pleads contributory negligence, which is an affirmative defense, and which answer under the rule of express aider cures the very defects which it complains of in respondent's petition. Currell v. Railroad, 97 Mo. App. 98; Insurance Co. v. Tribble, 86 Mo. App. 546; Bode v. Insurance Co., 103 Mo. App. 289.

REYNOLDS, P. J.—This is an action by respondent against the city of Portageville, to recover damages in the sum of $2000, for injuries alleged to have been sustained by her in consequence of a defective sidewalk in the defendant city. The answer, after a general denial, sets up that plaintiff, "if injured in the manner as set out in her petition, the same was the result of her own carelessness and negligence directly contributing thereto in this," and then sets up that plaintiff was going along the sidewalk in broad daylight and was crossing over the point where the hole was alleged to be with full knowledge of the alleged defect, which was open and obvious, and that she passed over it in a careless and negligent manner, "there being a safe and secure way for her to have gone, thereby endangering her own safety." After filing this answer plaintiff by leave withdrew it and filed a demurrer on the ground that the petition

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did not state facts sufficient to constitute a cause of action. This was overruled and defendant refiled its answer.

There was a trial before the court and a jury and a verdict for plaintiff in the sum of $750. Defendant in due time filed its motion for new trial. This was overruled. Afterwards and in due time defendant filed its motion in arrest of judgment which was also overruled. Thereupon defendant duly perfected its appeal to this court, filing its bill of exceptions in due time.

In the abstract of the record furnished by counsel for appellant are two affidavits following the certificate of the clerk of the circuit court to the transcript. In and by these affidavits affiants state that they were the attorneys who assisted the city attorney in defending this case in the circuit court; that they prepared the motion for a new trial and a motion in arrest of judgment, signed them and filed them; that they were both present in court when the motions for new trial and in arrest were acted on by the court, and at the time the court overruled the motions they excepted in open court to the action of the court in overruling each of these motions. It is further set out in these affidavits that the attorney for plaintiff refused to O. K. the bill of exceptions with exception of defendant noted to the action of the court in overruling the motions for new trial and in arrest, for the reason that the clerk of the court failed to get the exceptions of the defendant to the action of the court in his minute book and that the court would not sign the bill of exceptions without the approval of the attorney for plaintiff inasmuch as the records of the court failed to show exceptions to his action in overruling those motions; that for this reason counsel were unable to get their exceptions noted in their bill of exceptions. One of these affidavits is sworn to before the clerk of the circuit court of New Madrid county,

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the other before a notary in Indiana. There is nothing in the abstract indicating that these affidavits were ever filed in the circuit court or that they have been filed in any court, save that they are embodied in the abstract of the record, as before stated, filed in this court by appellant.

The bill of exceptions, as is recited in it, which was filed, sets out that defendant had tendered it as its bill of exceptions and prayed that it might be signed and sealed as such which was accordingly done by the circuit judge in vacation.

It is contended by counsel for appellant that we can consider these affidavits as correcting the bill of exceptions. This presents precisely the same point which was involved in the case of Murphy v. Lorwood Cooperage Co., the opinion in which is to be filed along with the opinion in this case. It is unnecessary to repeat what is there said on this matter of the bill of exceptions. We refer to that as equally applicable to this case.

This leaves for our consideration only the record proper. It is true that the petition in the case is indefinite and lacking in specific averments, but we cannot say that it is so fatally defective as to state no cause of action or as not to support the verdict and judgment in the case. Demurring, and that demurrer being overruled, plaintiff elected to answer and thereby lost the benefit of the demurrer save as to the jurisdiction of the court over the subject-matter of the action, or that the petition does not state facts sufficient to constitute a cause of action. [Sec. 1804, R. S. 1909; Hanson v. Neal, 215 Mo. 256, l. c. 277, 114 S. W. 1073.] Nor can it avail itself of a motion in arrest for the reason that it has failed to save exceptions to the overruling of that motion. Irrespective of this, it is always open to appellant to attack the petition in this court for failure to state any cause of action. However defective this petition is, it is clear that the

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necessary facts can be implied from what is defectively stated. When that occurs, a defendant will not be heard, after verdict and judgment, to object that such a petition will not sustain a judgment. Such objection is only available when the petition fails to state any cause of action, not where one is defectively stated. [Hurst v. City of Ash Grove, 96 Mo. 168, l. c. 172, 9 S. W. 631; Scamell v. St. Louis Transit Co., 103 Mo. App. 504, l. c. 513, 77 S. W. 1021.] In addition to this it is a recognized rule of pleading in this State that the defective allegations of the petition may be supplied by the averments of the answer, so that reading them together a cause of action is stated. [Garth v. Caldwell, 72 Mo. 622, l. c. 629; Donaldson v. County of Butler, 98 Mo. 163, l. c. 166, 11 S. W. 572.] We have set out the substance of defendant's answer in this case. Construing it with the petition, we hold that there is such a cause of action stated in the case as warranted the verdict and supports the judgment. The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

BLACKMER & POST PIPE COMPANY, Appellant, v. MOBILE & OHIO RAILROAD COMPANY, Respondent.

St. Louis Court of Appeals. Argued and Submitted October 7, 1912. Opinion Filed November 12, 1912.

1. **NEW TRIAL: Excessive Damages: Offer to Remit: Indefinite Offer.** The trial court did not err in granting a new trial on the ground the verdict was excessive, notwithstanding plaintiff offered to remit the excessive portion, where he did not indicate how much he was willing to remit, or on what counts, but threw the burden of determining the proper amount on the court, since a remittitur should be stated in such a definite manner that the court may act intelligibly on it.

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2. **APPELLATE PRACTICE: Questions Reviewable: Excessive Damages.** On appeal from an order granting a new trial, in an action where the petition states two causes of action in four counts, on the ground that the jury, by finding for plaintiff on all counts, allowed a double recovery, the appellate court is not authorized to determine whether the total of the verdict exceeds the amount of damages proved.

3. **INSTRUCTIONS: Form of Verdict: Several Counts Stating Same Cause of Action.** Where plaintiff states the same cause of action in different counts, the court should charge that, if the jury finde for him on one of the counts, it should find no damages, or, if it be proper to award nominal damages, merely nominal damages, on the other counts.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Shields,* Judge.

AFFIRMED AND REMANDED.

Dawson & Garvin for appellant.

(1) The jury correctly found all of the issues joined by the pleadings in favor of the plaintiff and the damages assessed on each cause of action, irrespective of counts, was less than the amount claimed in the petition, and shown by the evidence; if, therefore, the judgment entered by the trial court for the aggregate damages assessed by the jury was not proper (which we deny) the trial court should have entered a proper judgment upon the verdict and should not have set aside the verdict, and this court should now reverse the action of the trial court and direct the verdict to be reinstated and a proper judgment entered thereon. Pipe Co. v. Railroad, 137 Mo. App. 479; Buckman v. Railroad, 100 Mo. App. 30; Akers v. Bank, 63 Mo. App. 316; Lancaster v. Insurance Co., 92 Mo. 460; Stone v. Perkins, 217 Mo. 586; Lumber Co. v. Tiede & Co., 130 Mo. App. 260; Brackett v. Brackett, 61 Mo. 221. (2) The verdict rendered is the legal equivalent of a general verdict on each cause of action, because the damages assessed are

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equally divided between the two counts, which are mere separate statements of the identical same cause of action, and the aggregate of these amounts does not exceed the damage alleged in the petition and shown by the evidence to have been sustained to the subject of said cause of action; and is not double damages, and does not render the verdict in plaintiff's favor on both counts excessive, or vitiate the judgment. Moseley v. Railroad, 132 Mo. App. 646; Akers v. Bank, 63 Mo. App. 316; Moffett v. Turner, 23 Mo. App. 194; Ryan v. Copes, 11 Rich. Law (S. C.) 217; 73 Am. Dec. 106; Walsh v. Walsh, 114 Ill. 655; 23 Cyc. 823, 829, 830; Kearney v. Wurdeman, 33 Mo. App. 447; Carpenter v. Hamilton, 185 Mo. 603; Zellars v. Water & Light Co., 92 Mo. App. 107. (3) If the verdict and judgment are in fact excessive (which we deny), they are curable in this case by remittitur and plaintiff's offer to remit should have been accepted by the trial court and may still be accepted by this court if found necessary, to avoid a third trial and further expense and delay of litigation. Trustees of C. U. v. Hoffman, 95 Mo. App. 488; Chandler v. Gloyd, 217 Mo. 418; Jansen v. Dolan, 157 Mo. App. 32; Rush v. Railroad, 157 Mo. App. 504; Moore v. Transit Co., 226 Mo. 689; Cartwright v. Culver, 74 Mo. 179; Clifton v. Railroad, 232 Mo. 708; McGraw v. O'Neil, 123 Mo. App. 691; Franklin v. Butcher, 144 Mo. App. 660; Berthold v. Gruner, 12 Mo. App. 575; Pucket v. Railroad, 25 Mo. App. 650; Brooking v. Shinn, 25 Mo. App. 277; Miller v. Hardin, 64 Mo. 545; Schuck v. Pfenninghausen, 101 Mo. App. 697; Osborn v. Railroad, 144 Mo. App. 119.

R. P. & C. B. Williams filed argument for respondent.

REYNOLDS, P. J.—This is the second appeal in this case, the first appeal by defendant. It was reversed and remanded, the opinion being reported un-

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der the title of Blackmer & Post Pipe Co. v. Mobile & Ohio Railroad Co., 137 Mo. App. 133, 119 S. W. 13. At the same time the companion case of the same plaintiff against this defendant and other railroad companies was also reversed and remanded, the latter case being reported under the title of Blackmer & Post Pipe Co. v. Mobile & Ohio Railroad Company et al., 137 Mo. App. 479, 119 S. W. 1. This present case reaching the circuit court under our order of remander, plaintiff "dismissed without prejudice," it is stated, as to all of the defendants except the Mobile & Ohio Railroad Company, and filed an amended petition against that company alone, founded on losses said to have been sustained on the same shipments involved in the former case. This amended petition contains four counts, the pleader evidently following the suggestion made by this court in reversing and remanding, that as before presented the petition was confusing in that it appeared to charge, in one and the same count, the carrier on its common law liability and for breach of contract. In and by the first count of the amended petition, plaintiff avers common law liability on the part of the common carrier for sewer pipe damaged in transit, damage being claimed in the aggregate sum of $285.77; the shipment contained in four cars. The second count is on the same shipment in the same four cars, the same amount of damage being alleged to have been sustained for negligence in the carriage of the freight in those same cars. The third count is for damages under the common law liability of the carrier in the transportation of one carload of sewer pipe, damages laid at $59.40, inclusive of interest and costs; the fourth count claiming the same amount of damages, interest and costs, for negligence in the transportation of the same car of sewer pipe.

The answer admitting the incorporation of defendant, pleads that the carriage of the sewer pipe was

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at a reduced rate of freight, on which consideration plaintiff agreed with defendant that the pipe should be carried at the risk of plaintiff. Various other stipulations in the bill of lading are set out which are not now material to notice, except that it is averred that it was provided among other things in the bills of lading, that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property; and if delayed more than thirty days after delivery of the property, or after due time of delivery thereof, no carrier of the property should be liable in any event, the answer claiming that this had not been complied with. As a further defense to each of the counts, the five-year Statute of Limitations is set up. These matters were put in issue by the reply.

The reply set out that the notice of the breakage had been duly given defendant, its connecting carriers and agents and that plaintiff's claim for damages was received by defendant as duly presented and was considered by defendant in the same manner as if it had been entered in thirty days, and all requirements regarding the time or manner of presentation of said claim had been waived by the defendant, payment of the claim being refused on other grounds.

There was a trial of the cause before the court and a jury, at the conclusion of which, the jury, having been instructed by the court, returned a verdict in favor of plaintiff on the first count in the aggregate sum of $284. On the third count the jury found for plaintiff and assessed its damage at the aggregate sum of $43.21. There was also a verdict for plaintiff on the second count in the aggregate sum of $207.84, and on the fourth count in the aggregate sum of $43.21. Judgment followed in the sum of $502.10, "being the aggregate damages as assessed by the jury as aforesaid upon the four counts of the petition." In due time defendant filed its motion for a new trial and in

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arrest. Among other grounds stated in the motion for new trial were that the verdict was excessive; that the jury had rendered two verdicts in the same case; that the verdict is void and will not support a judgment.

The motion in arrest need not be noticed as it does not appear to have been acted on one way or the other by the court.

The court sustained the motion for new trial, as stated in the record, "because the plaintiff sued on two causes of action in four counts, and the jury found for the plaintiff on all four counts, assessing double damages and because the verdict is excessive." In a memorandum handed down by the court and in the record, it is stated that the motion for new trial was sustained "because the plaintiff sued on two causes of action in four counts, and the jury found for the plaintiff on all four counts, assessing double damages, and because the verdict is excessive," and the court did not think the evil could be cured by remittitur. Thereupon counsel for plaintiff filed a written offer to remit such part of the damages theretofore assessed as the court considered excessive. The court declined to enter an order of remittitur, whereupon plaintiff, duly saving exception, perfected its appeal to this court.

We confine ourselves to the one proposition that is decisive of the appeal; that is, whether the court committed error in granting a new trial for the reasons assigned, and in overruling the application of plaintiff to the court to remit, and in disregarding and declining the offer of plaintiff to remit.

It is to be noted that learned counsel for plaintiff did not indicate in their motion before the trial court how much should be remitted or on what counts a remittitur should be made, but threw upon the court the burthen of determining what the proper amount of the verdict should be and how much should be re-

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mitted. That is a burthen the court is not bound to assume. When a remittitur is offered it should be stated in so definite a manner that the court may intelligibly act on it.

It is argued in our court with great earnestness by counsel for appellant that even taking the sum total of the verdict, it is not in excess of the amount of damages which were proved up in the case. We, as a court, are not authorized to determine that. This error of the jury in assessing damages on each one of the counts was probably brought about by the form of the verdict submitted to them and by the somewhat confused instruction of the court in that respect, that instruction not clearly telling the jury, as it should, that if they found damages as on common law liability, they should return a verdict for that, in which event plaintiff was not entitled to any damages, or at most mere nominal damages, on the counts sounding in actual damages, and *vice versa* as to breach of contract. [Lancaster v. Connecticut Mut. Life Ins. Co., 92 Mo. 460, l. c. 467, 5 S. W. 23.]

We think the learned trial court committed no error in granting a new trial. Its action in that behalf is affirmed and the cause remanded with directions to proceed in due course of law. *Nortoni* and *Caulfield, JJ.*, concur.

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STATE ex rel. GOODMAN & COMPANY et al., Relators, v. CIRCUIT COURT OF ST. FRANCOIS COUNTY, Respondent.

St. Louis Court of Appeals. Submitted on Return and Briefs October 7, 1912. Opinion Filed November 12, 1912.

1. **CERTIORARI: When Available: Other Remedy.** *Certiorari* is allowed only when an appeal, a writ of error or other available mode of review is not afforded.

2. **———: ———: ———: Appellate Practice: Appealable Orders.** Where a motion, under Sec. 7573, R. S. 1909, for rule and attachment to compel a justice of the peace to allow an appeal and return his proceedings in an action together with the papers required to be returned by him, is denied by the circuit court, the ruling is reviewable by appeal or writ of error, and hence *certiorari* does not lie to review the ruling; and this is true although no formal judgment was entered, since, on a proper motion, a formal judgment could have been entered, from which an appeal or writ of error could have been prosecuted.

3. **———: ———: Necessity of Final Judgment.** *Certiorari* reaches only to cases in which there are final judgments or orders.

Original Proceeding by Certiorari.

WRIT QUASHED.

Merrill Pipkin for relator.

J. H. Malugen for respondent.

REYNOLDS, P. J.—One William Good, at the relation and to the use of Abe Gordon, commenced his action before a justice of the peace of St. Francois county, for damages alleged to have accrued to him on the breach of a bond said to have been executed by Goodman & Co., the United States Fidelity & Guaranty Co., and Merrill Pipkin. Summons was issued, returned as served as to some of the defend-

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ants. Mr. Pipkin appeared and filed an affidavit denying the execution of the bond by him in any other capacity than as agent for others of the defendants. The other defendants, Goodman & Co., and the United States Fidelity & Guaranty Co., filed motions denying the jurisdiction of the court in the cause and Goodman & Co. denied that they had been served. The motions to dismiss for want of jurisdiction were overruled and the cause continued for service as to Goodman & Co. On the day to which the cause had been continued, plaintiff appeared by attorney but the defendants making default and the judgment reciting that it appearing that all the defendants had been duly served, the justice proceeded to hear the cause and found for plaintiff, rendering judgment against the defendants for the damages claimed. In due time the attorney for defendants filed an affidavit for appeal, the affidavit setting out that defendants appeared only for the purpose of appeal, and "that the application for an appeal from the judgment in the above entitled cause is not made for vexation, or delay, but because he believes the appellants are injured by the judgment of the justice therein." This was filed by the justice. Defendants thereupon signed and executed a bond which was approved by the justice. The justice entering upon his docket the fact of filing the bond and the application for an appeal, set out this in his docket entry: "The appeal is by me not granted on account of the defect in the affidavit."

Afterwards at the November, 1911, adjourned term of the circuit court of St. Francois county, the defendants filed their motion setting out that judgment had been rendered in the justice's court in December, 1911, for plaintiff and that within ten days thereafter the defendants filed affidavit for appeal, together with a good and sufficient bond, and that notwithstanding the filing of the bond and affidavit, the justice refused to grant and allow an appeal to the

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circuit court. The motion proceeds: "Wherefore by (virtue) of section 7573, Revised Statutes 1909, defendants move for a rule and attachment on said justice to compel him to grant said appeal and send all papers to this court." The circuit court thereupon, on January 29, 1912, at the adjourned November term, issued an order reciting the motion "requiring the justice to grant an appeal," and that the court had seen and heard it and ordered "that the case be *certified* to this court by said justice O. M. Bonney, for examination and review in order that the court may determine whether *the appeal herein should be granted.*" (The italics are in the return.) The justice thereupon, on March 21, 1912, filed the transcript and papers above referred to in the circuit court.

Afterwards, and at the succeeding May, 1912, term the defendants, by leave of court, filed an amended affidavit for appeal. This amended affidavit states "that the application for an appeal from the merits in the above cause is not made for vexation or delay but because he (affiant) believes the appellants are injured by the judgment of the justice herein. Affiant further states that this appeal is from the merits of the cause." After filing this amended affidavit, and apparently during the same May term, the defendants served on plaintiff's attorney notice of the appeal. This on the 4th of June, 1912, and during the May term. On the 13th of June and during the May term, 1912, of the circuit court the following proceedings were had in the cause, namely:

"Abe Gordon, Plaintiff, v. I. Goodman & Company, Defendants.—Certified J. P.

"Now at this day the court of its own motion orders an entry *nunc pro tunc* correcting the record herein and that the entry of record of this court on January 29, 1912, which read as follows, 'Now comes defendant and files its motion to make a rule, order and attachment upon O. M. Bonney, justice of the peace

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of Perry township, St. Francois county, requiring said justice to grant an appeal of this cause to the circuit court, said motion being seen and heard; it is ordered that the case be certified to this court by said O. M. Bonney,' be corrected and reformed so as to read *nunc pro tunc* or now for then as follows: 'Now comes defendant and files its motion to make a rule, order and attachment upon O. M. Bonney, justice of the peace of Perry township, St. Francois county, requiring said justice to grant an appeal of this cause to the circuit court, said motion being seen and heard, it is ordered that the case be certified to this court by said justice O. M. Bonney for examination and review by this court, and now it is further adjudged that this court has no jurisdiction to order the appeal herein to be granted.' "

The defendants in the court below thereupon presented to this court a petition for *certiorari* to issue to the circuit court requiring it to send up the record and files in the cause. We issued the writ as prayed for, and the return of the circuit court being duly made, sets out the foregoing as the record in the case.

In the recent case of State ex rel. Evans v. Broaddus et al., Judges, 149 S. W. 473, not yet officially reported, our Supreme Court has held that where an appeal or writ of error does not lie, "*certiorari* does not go as a right, but it goes in such cases in order that profert of the challenged record be made to be searched for jurisdictional defects; that is, orders, judgments, and parts of judgments without (or in excess of) the jurisdiction of the subordinate court making or rendering them. . . . *Certiorari* does not take the place of mandamus to compel the making of a record; but it takes the record as it finds it, excluding the mere evidence which can, in the nature of things, relate to the merits only, tending to show, as it does, that the court erred in its judgment. The office of the writ is not to review error of that sort."

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Certiorari is only allowed when no appeal or writ of error or other available mode of review is afforded. [State ex rel. v. Edwards, 104 Mo. 125, 16 S. W. 117.]

The proceeding before the trial court in this case was under section 7573, Revised Statutes 1909. It has been held by our court in Morris v. Scherer, 76 Mo. App. 401, l. c. 406, that proceedings under this section, triable before the court without a jury, are not reviewable on appeal as to the finding of fact, but no decision that we are aware of holds that they cannot be reviewed on questions of law, by either appeal or writ of error. The action of the trial court in the case at bar was in effect a denial of the motion made before it for an order on the justice to grant an appeal. That was a final disposition of the cause by the circuit court. While it is true that no formal judgment appears then to have been entered up, that does not change the fact that the court denied the prayer of the motion—the relief sought. On proper motion a formal judgment to that effect could undoubtedly have been entered. At all events, while the motion of the relators here, made in the circuit court, was for an order on the justice requiring him to grant an appeal, the circuit court declined to issue an attachment or make an order granting an appeal. Nor did it ever make any such order. Even in the original order as entered, it does not, "by rule and attachment, compel the justice to allow the (appeal) and to return his proceedings in the suit, together with the papers required to be returned by him," (section 7573), but orders "that the case be certified to this court by said justice . . . for examination and review, in order that the court may determine whether the appeal herein should be granted." When the court subsequently entered up a *nunc pro tunc* order, it did not order an appeal but, following its former order, ordered that the case be certified "for examination and review,"

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and followed this up by the finding that it had no jurisdiction to order an appeal.

As before noted it does not appear that any further order was entered in the cause by the court. If it be argued that the omission of a formal and final judgment precludes an appeal, then such omission is equally fatal on *certiorari*, for that writ reaches only to cases in which there are final orders or judgments. We do not think that the omission of a formal order is of substance here. It was open to correction; could have been supplied. Its omission does not change the fact that the court did deny the relief sought by relators here, defendants below. That order denying the rule for an appeal was a final disposition of the case, and authorized an appeal or writ of error.

Coming to the exact point in decision in this case, we hold that where application is made under the provisions of section 7573, Revised Statutes 1909, for rule and attachment to compel the justice to allow an appeal and return his proceedings in an action, together with the papers required to be returned by him, and the circuit court refuses the rule, the action and the ruling of the court on that application is appealable or can be brought before the appellate court on writ of error.

Causes arising under what is now section 7573 have been before the appellate courts several times. In all of them to which our attention has been directed the proceedings in the circuit court have been considered on appeal. [See Kelm v. Hunkler, 49 Mo. App. 664; Morris v. Scherer, supra; Hagerty v. Lierly, 109 Mo. App. 631, 83 S. W. 542; Bader v. Jones, 119 Mo. App. 685, 96 S. W. 305; Leeper v. Carter, 137 Mo. App. 617, 119 S. W. 463.] Being appealable, *certiorari* does not lie.

It follows that the writ of *certiorari* issued herein should be and it is quashed. *Nortoni* and *Caulfield, JJ.*, concur.

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SCIENTIFIC AMERICAN CLUB, Respondent, v. LOUIS HORCHITZ et al., Appellants.

St. Louis Court of Appeals, November 12, 1912.

1. **CONSTITUTIONAL QUESTION: Elimination: Appellate Practice.** Where the Supreme Court transfers a case appealed to it to one of the courts of appeals, on the ground it has no jurisdiction, constitutional questions sought to be raised are eliminated.
2. **RES ADJUDICATA: Matters Concluded: Foreign Corporations: Right to Sue.** A judgment of a court having jurisdiction of the parties and subject-matter is conclusive on the parties as to all matters in issue or tried, or which could have been tried, and the right of a foreign corporation to maintain an action is an issue than can be tried, and hence a judgment for such a corporation is conclusive as to its right to maintain the action.
3. **JUSTICES' COURTS: Appeal to Circuit Court: Conclusiveness of Judgment on Surety.** A surety on an appeal bond, on appeal to the circuit court from a judgment of a justice of the peace, is in privity with the judgment debtor, and the judgment is binding on both.
4. **FOREIGN CORPORATIONS: Right to Sue: Affirmative Defense.** The fact that the plaintiff in an action is a foreign corporation raises no presumption that it is not authorized to do business in this State, but that is an affirmative defense which, to be effective, must be made and sustained.
5. **EXECUTIONS: Attack: Sufficiency: Foreign Corporations: Right to Sue.** If it were allowable (which it is not) for an execution defendant to attack the execution on the ground that the plaintiff is a foreign corporation, not authorized to do business in this State, the mere filing of an *ex parte* affidavit, not brought to the attention of the court, in support of the motion to quash the execution, setting out that the foreign corporation had not complied with the statute, would not establish the truth of the matter set up in the affidavit nor be sufficient to sustain the attack on the execution.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel G. Taylor*, Judge.

AFFIRMED.

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Frank K. Ryan for appellants.

(1) A foreign corporation, doing business in Missouri and not having complied with our statute, cannot maintain any suit or action in any of the courts of this State. R. S. 1909, secs. 3037, 3038, 3039 and 3040; Shoe Machinery Co. v. Ramlose, 210 Mo. 631; Zinc & Lead Co. v. Mining Co., 221 Mo. 7. (2) The issuing of an execution on behalf of a party in whose favor a judgment has been rendered is the maintaining of a suit or action by such party. 17 Cyc. 986, 1076, 1077; Davis v. McCann, 143 Mo. 172; Eckerle v. Wood, 95 Mo. App. 378; Gurnee v. Brunswick, 11 Fed. Cas. (U. S.) 117; Dobbins v. Bank, 112 Ill. 553; Coal Co. v. City, 158 Ill. 9; Callen v. Ellison 13 Ohio St. 446; People v. Rensselaer, 13 How. Prac. 398; Lackawanna v. Bates, 56 Fed. 737; Murphy v. Cochran, 1 Hill's 339; Hurlbutt v. Currier, 68 N. H. 94; Kuklence v. Vocht, 4 Pa. C. C. 370. (3) Issuing and levying an execution on behalf of an unlicensed foreign corporation upon a summary judgment against a surety on an appeal bond is not due process of law. Barber Asphalt Co. v. Ridge, 169 Mo. 376. (4) A judgment based upon a contract which is illegal and void, either because it is *malum in se* or *malum prohibitum,* is not enforcible against a party who had no opportunity to set up the illegality of the contract at the time of the rendition of the judgment. Bredin's Appeal, 92 Pa. 245; Given's Appeal, 121 Pa. 260.

Bishop & Cobbs for respondent.

(1) It is an elementary and well-settled rule, that joint assignments of error must be good as to all who join therein, or will not be available to any of them. 2 Cyc. 1003. (2) The question as to whether or not a foreign corporation is guilty of doing business in this State without a license, so as to bar it from maintaining a suit in this State, is a question of fact, to be

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alleged and proved as a defense. It cannot be raised for the first time in a motion to quash an execution. Parlin & Orendorff Co. v. Boatman, 84 Mo. App. 667; Insurance Co. v. Smith, 73 Mo. 368; State for use v. Hudson, 86 Mo. App. 501; American Club v. Horchitz, 128 Mo. App. 575. (3) A judgment entered against a surety on an appeal bond, in accordance with an express statute, constitutes due process of law.

REYNOLDS, P. J.—Plaintiff commenced its action before a justice of the peace to recover a debt claimed to be due it by the defendant Horchitz. On trial before the justice there was a verdict and judgment for plaintiff. Seven days after the judgment was rendered, defendant appealed to the circuit court, giving an appeal bond with appellant Levin as surety. No notice of the appeal having been served on plaintiff, and after the lapse of several terms of the circuit court, plaintiff filed its motion to affirm the judgment of the justice for failure to give notice of the appeal. At the same term defendant Horchitz filed a motion to dismiss the appeal for the reason that plaintiff was a foreign corporation, organized under the laws of the State of New York and that at the times mentioned in the petition or statement in the case it was not authorized to do business in this State by its failure to comply with the provisions of what is now section 3039, Revised Statutes 1909, and under what is now section 3040, it could not maintain any action or suit This motion was stricken from the files by the circuit court and the motion to affirm the judgment of the justice sustained, the judgment being rendered in the circuit court in favor of respondent, plaintiff below, and against Horchitz, the defendant in the case, and Levin his surety on his appeal bond. Whereupon defendant Horchitz appealed to this court, where the judgment of the circuit court was affirmed. [See Scientific American Club v. Horchitz, 128 Mo. App. 575, 106

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S. W. 1117.] Execution thereupon issued out of the office of the clerk of the circuit court against Horchitz and Levin, who thereupon filed their motion to quash the execution, alleging the same grounds as set out in the former motion, that is failure of plaintiff to comply with the provisions of section 3039, supra, and upon the further ground that the summary judgment against defendant Levin, surety on the appeal bond, and issue of execution thereon deprived him of his property without due process of law, in violation of the provisions of the Constitution of this State and of that of the United States, "and deprived him of that right and justice and the administration thereof guaranteed by section 10, article II, of the Constitution of Missouri." This motion was sworn to by defendant Horchitz, who filed an affidavit to the effect that he was well acquainted with the ownership and management of plaintiff and its method of doing business and that he knew that plaintiff had not obtained a license to do business in this State, having made an examination in the office of the Secretary of State; that he had also received a letter from the Secretary of State, attached to the affidavit, to the effect that the Secretary of State was unable to locate any foreign corporation licensed in this State under the name of Scientific American Club. Beyond filing this affidavit it does not appear that anything else was done concerning the motion to quash the execution. It does not appear that any evidence was offered in support of the motion, it not even appearing that this affidavit was ever presented to or called to the attention of the trial judge. The court overruled the motion to quash the execution, defendants excepting. Praying an appeal to the Supreme Court of this State and filing bond, defendants duly perfected their appeal to that court. The Supreme Court transferred the cause to this court on the ground that the amount involved did not ex-

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ceed the sum of $7500 and that the Supreme Court had no jurisdiction of the cause on appeal.

It follows from this that the constitutional questions sought to be raised are out of the case, the only matter remaining for our consideration being the action of the circuit court in overruling the motion to quash the execution.

Learned counsel for appellants contend that suing out the execution is a new and distinct suit or action and that defendants are at liberty to attack that execution on the ground that the plaintiff corporation was not and is not authorized to do business in this State and cannot maintain any action or suit in this State.

Without going into an examination of the authorities cited by counsel or an elaborate discussion of the proposition, it is sufficient to say that the judgment in the case which was originally entered, was rendered by a court having jurisdiction over the parties and the subject-matter and is conclusive on the parties to it as to all matters which were in issue or which could have been brought up in the trial of the cause. Whether the right of plaintiff to maintain the action was or was not there in issue or tried, it was an issue which could have been there tried, and "the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." 2 Taylor on Evidence (8 Ed.), page 1454, sec. 1702, cited and quoted approvingly by our Supreme Court in Chouteau v. Gibson, 76 Mo. 38, l. c. 46. Defendant Levin, as surety on the appeal bond, is in privity with the defendant Horchitz and that judgment is binding on both of them. [Taylor on Evidence, Id., sec. 1684.]

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If, however, we are to go behind the judgment of the justice and enter upon an attack on the execution, it is clear that defendants have not produced any proof tending to sustain that attack. It is a well-settled rule in our State that the fact that plaintiff is a foreign corporation, raises no presumption that it is not authorized to do business in this State. That is an affirmative defense to the action which must be made and sustained. [See American Ins. Co. v. Smith, 73 Mo. 368; Parlin & Orendorff Co. v. Boatman, 84 Mo. App. 67; State to use v. Hudson, 86 Mo. App. 501; Scientific American Club v. Horchitz, supra.] The mere filing of an affidavit, without any showing that it was ever presented to or considered by the court, is very far from such an attack, very far from establishing the truth of the matter set up in that affidavit. So that even granting for the sake of the argument that defendants were at liberty to attack this execution for the reasons stated in the motion to quash, they have entirely failed, by any affirmative testimony, to establish the averments of their motion.

The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

AUGUST KIEL, Appellant, v. SIMON OTT, Respondent.

St. Louis Court of Appeals. Submitted on Briefs October 7, 1912. Opinion Filed November 12, 1912.

1. **EVIDENCE: Impeaching Evidence: Relevancy: Admissions.** In an action for personal injuries, a witness for defendant, testifying to a conversation between plaintiff and himself concerning the case, said that plaintiff remarked: "You know as well as I do that Ott (the defendant) is a good man and a church member and has lots of friends, and if you prove my reputation it will be a job for me to gain this. You know that

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as well as I do." *Held*, that the testimony was relevant to the issues as giving plaintiff's own statements concerning his reputation.

2. **NEGLIGENCE: Action for Personal Injuries: Instructions: Sufficiency of Evidence.** In an action for injuries alleged to have been caused by a horse, which plaintiff was riding, becoming frightened at a wood pile alongside the road and, as a result, jumping in such a manner as to throw plaintiff off, the jury could infer, from evidence which tended to prove that the horse was not frightened and did not jump, that the injury did not occur in the manner alleged, and hence an instruction that plaintiff could not recover if he was injured from any other cause than the horse being frightened at the wood pile was not vulnerable to the objection that it was not warranted by the evidence; but, even if it were conceded that there was no evidence of any other cause, the instruction would not be *held* erroneous, since it was undoubtedly understood by the jury to mean that, in order to find for plaintiff, they must find that he sustained his injuries in the manner and from the cause alleged by him.

3. **NEW TRIAL: Preponderance of Evidence: Prejudice of Jury.** In an action where plaintiff's case rested almost exclusively on his own testimony, and his credibility was attacked, it is *held*, under the evidence, that there was no such preponderance of evidence in his favor as warranted a new trial on the ground that a verdict for defendant resulted from prejudice, corruption or gross ignorance of the jury.

Appeal from Franklin Circuit Court.—*Hon. R. S. Ryors*, Judge.

AFFIRMED.

John W. Booth for appellant.

(1) Where the character of a party is not in issue, and no attempt to impeach him has been made, admission of evidence of his good character is reversible error. Dudley v. McCluer, 65 Mo. 241; Black v. Eppstein, 221 Mo. 286. (2) The action of the trial court in giving to the jury the instruction No. 3 at the instance of respondent, is reversible error. By that instruction the court directed the jury to find for respondent, if they believed from the evidence that ap-

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pellant was injured on Feb. 22, 1908, in the public road in front of respondent's premises by reason of any cause other than the frightening of the horse at the wood pile mentioned in the evidence; but there was no evidence tending to show that at that time and place any other cause for such frightening of the horse existed. State v. Edwards, 203 Mo. 528; Smith v. Couch, 117 Mo. App. 267; Ludwig v. Cooperage Co., 156 Mo. App. 117, 128; Felver v. Railroad, 216 Mo. 195. (3) The action of the trial court in overruling appellant's motion for new trial is reversible error, because the verdict of the jury is against the weight of the evidence in the cause to such an extent as to indicate that it is the result of prejudice influencing the jury against the plaintiff. Walton v. Railroad, 49 Mo. App. 620.

Oscar E. Meyersieck and *Jesse H. Schaper* for respondent.

(1) We think there can be no doubt that the admission of appellant that his reputation is bad, proved by his own declarations, is just as competent as the proof of his bad reputation by the testimony of other witnesses would be. But appellant's counsel objects to the conversation, because it also seems to admit that the defendant's reputation is good. Unfortunately for appellant, the comparison made by himself in said admission was exceedingly favorable to the defendant, and very damaging to him, but it was, nevertheless, a clear admission that his reputation was bad, and as such an admission, the same was admissible in evidence. Greenleaf on Evidence (14 Ed.), sec. 201. Such admisions must be taken as a whole and cannot be proved by introducing a part only of the conversation. Greenleaf on Evidence (14 Ed.), secs. 201 and 202; Howard v. Newson, 5 Mo. 523; Reeves v. Hardy, 7 Mo. 348; Lyon v. Batz. 42 Mo. App. 606. (2) Appellant also complains of instruction numbered 3, given by the

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trial court at the instance of respondent, because the same is not supported by evidence. There was evidence tending to prove the horse was not frightened and did not jump and throw plaintiff off; hence said instruction was proper, because supported by substantial evidence. Joseph v. Street Railway, 129 Mo. App. 603; Ridens v. Ridens, 29 Mo. 470.

REYNOLDS, P. J.—This is an action by plaintiff to recover damages alleged to have been sustained in consequence of being thrown from his horse, it being charged that plaintiff had wrongfully and unlawfully and without right, piled or caused to be piled a lot of cordwood on a public road in such manner as to create an obstruction calculated to frighten horses of ordinary gentleness and that while plaintiff was travelling along the road, riding a horse of ordinary gentleness, the horse became frightened at the piles of wood and jumped and threw plaintiff to the ground, thereby seriously injuring him, for which injuries sustained plaintiff claims judgment in the sum of $1500.

The answer was a general denial.

On trial before the court and a jury, the jury returned a verdict for defendant, from judgment on which plaintiff, filing his motion for a new trial and saving exception to that being overruled, has duly perfected his appeal to this court.

As to the facts it may be said that plaintiff's testimony tended to show that he received certain injuries by being thrown from his horse while he was riding along the road and between the piles of wood alongside of it. Defendant attacked the character of plaintiff for truth and veracity and also introduced evidence tending to show that the horse had not jumped; that measuring the tracks of the horse in the road showed the horse had neither jumped nor run off, as claimed by plaintiff.

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The errors assigned are three: First, to the court refusing to strike out the testimony of a witness named; second, giving to the jury an improper instruction; and third, to the overruling of plaintiff's motion for a new trial.

The first assignment of error cannot be sustained. The witness referred to being under examination on part of defendant, and testifying as to conversations between himself and plaintiff concerning the transaction, after having testified that in that conversation plaintiff had made a certain statement, was asked what, if anything further, plaintiff had then said. Whereupon the witness answered: "Well, he said this: 'You know as well as I do that Ott is a good man and a good church member, and has lots of friends, and if you prove my reputation it will be a job for me to gain this. You know that as well as I do.'" It is stated in the abstract that plaintiff thereupon moved the court to strike out the answer of the witness to the last question, "as having no bearing on the issues in the case and being improper evidence tending to prejudice the jurors against plaintiff." This is the motion referred to, which the court overruled and to which ruling plaintiff duly excepted. It will be noted that the question itself was not objected to when asked. The objection was made to the answer and for the reasons above. That answer might possibly have been objected to as not responsive to the question asked, although this is doubtful, but no such objection was made. The objection as raised is not tenable. The answer did bear on the issues as to plaintiff's own statements and on his character, and purported to give the whole conversation, as the witness was asked to do. That it may have influenced the jury in passing upon plaintiff's testimony unfavorably to plaintiff, does not render it improper.

The instruction complained of is to the effect that if the jury found and believed from the evidence that

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plaintiff was injured on the date named, in the public road in front of the premises of defendant, by reason of any cause other than the frightening of the horse at the wood pile mentioned in the evidence, then the verdict will be for defendant. It is objected to this instruction that there is no evidence tending to show any other cause of injury than the frightening of the horse. It is true that there is no direct evidence of any other cause, but there was evidence tending to show that the horse had not been frightened and had not jumped on the occasion referred to. From that it would seem to follow that the jury had a right to infer it was not the frightening and jumping of the horse that caused the injury. Apart from this however, even conceding the proposition of the learned counsel for plaintiff, that there was a lack of evidence of any other cause, we are not prepared to say, on reading all the testimony in the case, that this instruction was harmful or in any manner misled the jury. It was undoubtedly understood by the jury to mean that to find for plaintiff, they must find that he sustained his injuries in the manner and from the cause alleged by him.

This disposes of all the assignments of error except that plaintiff's motion for new trial, it is claimed, was improperly overruled. It is argued in support of this assignment that the motion for new trial should have been sustained by reason of the reception of the evidence and the giving of the instruction above referred to. We have disposed of these grounds. It is also claimed that the verdict of the jury is against the weight of the evidence to such an extent as to indicate that it is the result of prejudice, influencing the jury against plaintiff. In support of this ground, we are referred to Walton v. Kansas City, Fort Scott & Memphis Railroad Co., 49 Mo. App. 620, l. c. 627. In that case it is there stated that in Price v. Evans, 49 Mo. 396, Judge Bliss impliedly states that it is error in

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the trial court to refuse a new trial where the preponderance of evidence against the verdict is so strong as to raise the presumption of prejudice, corruption or gross ignorance on the part of the jury. Our court held in the Walton case that the facts in it clearly called for an application of that rule. Without determining whether that rule, said to be drawn from the Price case, in the light of many decisions recognizing the right to pass upon the weight of evidence as resting solely in the trial court, is now in force, it is sufficient to say that the present case does not call for its application. We cannot say that the preponderance of the evidence in this case is so strong as to raise the presumption of prejudice, corruption or gross ignorance on the part of the jury. Plaintiff's case rested almost exclusively on his own testimony, and his credibility as a witness was very seriously attacked by several witnesses.

The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

J. H. CRONAN, Respondent, v. L. E. STUTSMAN et al., Appellants.

St. Louis Court of Appeals, November 12, 1912.

1. **DAMAGES: Nominal Damages.** One who proves he has been damaged, but fails to prove the amount thereof, can recover only nominal damages.

2. **CONTRACTS: Breach: Damages: Duty to Minimize.** One injured by the breach of a contract must make a reasonable effort to render the injury as light as possible, and if he knows of the failure or neglect of the obligor to do that which he has agreed to do, within ample time to do it himself, and fails to do it, he cannot hold the obligor for loss resulting from such neglect; but where the obligor merely postpones performance and leads the obligee to believe that he will perform, the latter is not required to take steps to minimize the damages until the contract is abandoned by the obligor.

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3. ———: ———: ———: ———. In an action for damages for the breach of a contract to float logs, where defendant kept putting off performance until the logs had rotted, saying there was not enough water to float them, plaintiff could not be limited to nominal damages, on the ground that the damage was due to his own failure to float the logs, since defendant's conduct in postponing performance was sufficient to warrant a finding that plaintiff had been led thereby into the belief that defendant intended to perform, and it did not become his duty to float the logs himself, in order to minimize the damages, until he acquired knowledge that defendant had abandoned the contract.

4. ———: ———: **Damages: Sufficiency of Evidence: Verdict for Less Amount Than Damages Proved.** In an action for the breach of a contract to float logs, plaintiff's claim for damages being that the logs had rotted as a result of defendant's delay, proof that the logs were a total loss and what their market value was, was sufficient to establish the damages sustained, and the fact that the jury returned a verdict for a smaller amount than such evidence proved the market value to be is immaterial, so far as defendant is concerned.

5. **PLEADING: Variance.** A recovery cannot be had on a different theory than that counted on in the pleadings.

6. **CONTRACT: Action for Breach: Instructions.** In an action for damages for the breach of a contract to float logs, *held* that plaintiff's instructions were substantially correct.

7. ———: ———: **Evidence: Admissibility.** In an action for damages for the breach of a contract to float logs, *held* that the court did not err in ruling on the admissibility of evidence.

Appeal from Dunklin Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

Ward & Collins for appellants.

(1) The failure to perform a contract is a legal wrong, and for the violation of this right, independent of actual damages to the party for whose benefit the performance of the contract is due, nominal damages will be allowed. Fulkerson v. Eades, 19 Mo. App. 620; Dulaney v. Sugar Refining Co., 42 Mo. App. 659; Walber v. Esquire, 51 Mo. App. 601; Fidelity Deposit Co

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v. Colvin, 83 Mo. App. 210; 1 Sutherland on Damages 9-16; Holt v. Railroad, 87 Mo. App. 203. (2) It is the duty of the party injured by a breach of contract to make reasonable effort to avoid damage therefrom; such damage as might by reasonable diligence on his part have been avoided are not to be regarded as a natural and probable result of the defendant's acts. There can be no recovery therefore for damages which might have been prevented by reasonable efforts on the part of the party injured. Lawson on Contracts (2 Ed.), sec. 484; 8 Am. & Eng. Ency. Law (2 Ed.), 605; Douglas v. Stephens, 18 Mo. 362; Fisher v. Goebel, 40 Mo. 475; Waters v. Brown, 44 Mo. 302; State ex rel. v. Powell, 44 Mo. 436; Railroad v. McGrue, 104 Mo. 291; St. Louis v. Brown, 155 Mo. 564; Dietrich v. Railroad, 89 Mo. App. 40; Bridge Co. v. Schaubacher, 57 Mo. 586; Peck v. Roofing Co., 96 Mo. App. 212; Logan v. Railroad, 96 Mo. 464. (3) Where plaintiff, suing for damages, proves damage but not the amount of it, he can only recover judgment except for nominal damage. Brown v. Emerson, 18 Mo. 103; Owen v. O'Reilly, 20 Mo. 603; Mr. Cord v. Railroad, 21 Mo. App. 95; Hayes v. Delzelle, 21 Mo. App. 679; Morrison v. Yancy, 23 Mo. App. 670; Barngrover v. Maack, 46 Mo. App. 407.

C. G. Shepard filed argument for respondent.

REYNOLDS, P. J.—Plaintiff and defendants, the latter under the name of Southeast Missouri Cypress Company, were engaged in the business of cutting logs and piles from lands in Pemiscot county and placing the malong the railroad at different points for shipment, the principal shipping point of defendants being at Clay Root, a station on what is known as the St. Louis & Gulf Railroad. Prior to February 27, 1908, having had numerous dealings together growing out of this business, according to the averments of the pe-

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tition, a dispute arose between the parties over them, and defendants instituted one and threatened other actions against plaintiff. These actions pending or threatened, on February 27, 1908, as is averred and admitted, the parties compromised and settled all the matters in dispute between them up to that date and entered into a written contract, the execution of which is admitted. In and by that contract defendants agreed, among other things, to float to Clay Root all the oak piles in controversy, these piles to be found in water sufficient to float them to the bayou at the west end of the land on which the timber was cut; defendants to float, skid and load these piles on cars at Clay Root without cost to plaintiff. Defendants agreed that "from the total amount of indebtedness determined by the inspecting of all accounts and notes now at hand, John H. Cronan is to be allowed a reduction of $550; the Southeast Missouri Cypress Company is to assist John H. Cronan in borrowing $500, which shall be added to the said John H. Cronan's indebtedness." Summarizing the remainder of the petition, plaintiff alleges that after the making of this contract the water was sufficient to float the piles to the bayou and remained so long enough to float all of these piles; that in order to handle oak piles of the nature and kind covered by the contract between plaintiff and defendants, it takes large and strong machinery and equipment to haul them out of the water and load them on cars; that defendants at that time had such equipment at Clay Root which they were using in loading piles of like nature; that plaintiff had no such equipment, and was wholly unprepared to handle the piles himself, and was therefore bound to rely solely upon the contract entered into with defendants to handle them and have them placed on cars; that the reasonable market value of the piles was $4411.68; that defendants failed and refused to float the piles except eighty-

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eight pieces of the value of $512.96, and that the remainder, of the value of $3899.02, was wholly lost, to plaintiff's damage in that sum.

The answer, as summarized by counsel for defendants, is an "admission of contract and general denial; plea of insufficiency of water, and that plaintiff, knowing of the insufficiency of water over the piling where they lay, refused to put them in water sufficient to float them; permitted them to lay and rot, and the damage, if any, was occasioned by plaintiff's own negligence."

By way of counterclaim the answer further set out that plaintiff is indebted to defendants in the sum of $314.75 on account accruing after making the contract and judgment is prayed for this amount. No issue on the correctness of this counterclaim is now presented.

At the close of the testimony in the case the jury returned a verdict in favor of plaintiff in the sum of $1000, and in favor of defendants on the counterclaim in the sum of $314.75, a balance in favor of plaintiff of $685.25, for which amount judgment went in favor of plaintiff. Filing a motion for new trial as well as one in arrest and these being overruled and exceptions duly saved, defendants have perfected their appeal to this court.

Defendants here make four assignments of error. First, that the verdict is against the evidence and against the law under the evidence and could only have been for nominal damages. Second, that the court erred in giving certain instructions for plaintiff. Third, the court erred in refusing to give certain instructions asked by defendants, and fourth, that it erred in the admission of testimony.

The making of the contract and its terms are admitted. So also it is practically conceded that plaintiff had paid to defendants the $550 of old indebtedness and the $500 raised for him by defendants, in all $1050.

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for the work which defendants were to do in dragging out and loading the piles.

As conceded by learned counsel for appellants, many witnesses swore that on one or more rises the water was deep enough to float the oak piles, and as many or more witnesses swore that at no time from the making of the contract until the piles spoiled, which was about a year after this contract had been entered into, did the water get high enough to float these piles. It was agreed by all the witnesses that green oak piles with the sap in them would not float and that to float them required "floaters," that is sticks of light weight timber, such as ash or cypress, to be placed on each side of the oak pile and fastened so as to buoy them. When properly buoyed, the oak piles, said one of the witnesses, could be floated and when floated it would take, say twenty-two inches of water to float an eighteen-inch oak pile. It seems that it was also the custom, in floating this timber, to cut through the swamps and sandy ridges or higher ground to the deeper water, what is called a "float road," that is, as we understand it, a ditch from which stumps and undergrowth were cleared for the requisite depth, and by means of these "float roads," the piles were carried through the swamps and ridges that might intervene between the starting point and the deep bayou down which they were to be floated. It was in evidence that by means of "float roads," the piles could easily have been floated out at different times between the making of the contract and the time when it is alleged that by allowing them to remain they had rotted and become valueless. In their statement before us, counsel for appellants themselves admit that "whether or not the oak piling was ever found in sufficient water to float it, was the question for the jury, and by their verdict they evidently found that it was. Hence we are bound on this appeal by that verdict that there was a breach of the contract." Counsel then argue that "a breach of

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this contract without any other or further showing would only entitle plaintiff to a verdict for nominal damages." Herein lies the crux of this appeal and on it are based practically all the assignments of error except the fourth.

It may be conceded, as claimed by counsel, that where a plaintiff sues for damages and proves that he has been damaged, but fails to give any evidence tending to prove the amount of his damage, he can recover only nominal damage. Furthermore it is beyond doubt, as also urged by counsel, that it is the duty of the party injured by a breach of contract to make reasonable effort to render the injury as light as possible. If he knows of the failure or neglect of the one with whom he has contracted to perform that contract within ample time to do it himself, and fails to do so, he cannot hold the other for a loss by such neglect. [Lawson on Contracts (2 Ed.), sec. 484. See also City of St. Louis v. Brown, 155 Mo. 545, l. c. 564, 56 S. W. 298.] We do not think that the facts in evidence bring defendants within the protection of these rules.

Counsel for appellants contend, in substance, that plaintiff, when defendants failed to do so, was bound to go in and attempt to float these piles out himself; that he did not undertake to show any excuse why he did not get them out himself and why he "sat around and let it rot;" that it was for him to have shown by proof what it would have cost him to take out and load these piles; that this amount was the measure of damage, and that while plaintiff had shown a breach of the contract entitling him to nominal damages, by reason of his failure to prove the cost of doing the work himself, he was not entitled to more than nominal damage.

We are compelled to differ with learned counsel as to the statement that plaintiff had failed to introduce any evidence tending to show any excuse why he

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did not get out this timber. Plaintiff, testifying in his own behalf, has given his reason for not doing so. After stating that this timber in the woods was entirely ruined, he testified that neither defendants nor their foreman said they would not take it out before it was ruined; that he (plaintiff) had talked with Mr. Stutsman, one of the defendants, frequently about it; that Stutsman told him there was not sufficient water and that it was so reported by his men. "He said he would bring them down when there was water enough; kept promising he would load these piling when there was sufficient water." On cross-examination plaintiff further testified that Stutsman had told him all the time that there was not sufficient water; that was his claim. "It was according to the report of his men, so he said. I wanted him to go with me and see and he set a day or two to go with me and something came up and he couldn't go, and I got Hammond to go with me. I wanted him to go with me so we could view it together; so we would know it ourselves. I believe if he had gone up there with me he would have put them out; I found sufficient water when I got there."

This was evidence from which the jury had a right to conclude that plaintiff, for almost a year or until the piling had rotted, had been led into the belief that defendants intended to carry out this contract. In short, according to plaintiff, defendants never abandoned the contract, so far as plaintiff knew, until the piles had rotted; had never before then thrown it up, but put off performance from time to time until, by the action of the weather and of the water, the piling had become valueless. If there was no abandonment of the contract on the part of the defendants of which plaintiff was notified, he was under no obligation to go in himself, treat the contract as abandoned and attempt to get out this piling and save it from rot and decay. If he had done that, and brought his action for the expense thereby incurred, he would

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probably have been met with the defense that he was a mere volunteer in going into the work and had himself prevented defendants from performance. It is true that if he found defendants had thrown up their contract, and he could have gone in and saved this timber or any of it, it was his duty to do so; but he would not, in this action, have been entitled, as these refused instructions said, to the value of his work in doing so, and his failure to prove what that work would have cost, did not limit him to nominal damages in this action. Plaintiff did not bring this action on any such theory; that is not his cause of action. It is for breach of contract and seeks the recovery of damages for the entire loss of the timber.

It is beyond question that plaintiff introduced testimony tending to prove that by the default of defendants, the timber was a total loss, so far as its market value as piles was concerned, and that its value was as alleged in the petition. This was evidence of actual damage. That the jury did not accept his valuation is immaterial, and to the loss of plaintiff, but he has not appealed.

Defendants, however, sought at the trial and now seek before us, to put this case on another basis, claiming that plaintiff can only recover for what it would have cost him to float out and load these piles himself. It was on this theory that the refused instructions were predicated.

The instruction marked A, which defendants asked and which the court refused to give, was to the effect that even if the jury found and believed from the evidence that defendants broke the contract sued upon and failed and refused to carry out the provision to be performed by them, yet under the pleadings and evidence in the case, the verdict for plaintiff can only be for nominal damages and by nominal damages is meant a sum not exceeding one dollar. This instruction and the others refused proceeded upon the theory

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that it was the duty of the plaintiff to have gone in and attempted to save this timber himself, and that the measure of his recovery would be the cost of doing this, and that as he had not given any evidence of that cost, he could recover nominal damages only.

If plaintiff allowed this timber to rot when he could have saved it after knowledge of abandonment of the contract by defendants, he was bound to do so and in that event would be entitled to the cost of effecting salvage and, if not paid, could have brought his action for that cost. But that was not this case. To have instructed that plaintiff could recover the cost of saving this timber, would have allowed action on one cause and recovery on another. This, it has been held in case after case, cannot be allowed.

We discover no reversible error in the instructions given at the instance of plaintiff. They were substantially correct on the theory upon which plaintiff brought his action.

Nor do we find any error to the injury of defendants in the action of the trial court in the admission of evidence.

Upon the whole record we find no error to the prejudice of defendants. In point of fact, considering the amount of the verdict in connection with the evidence in the case, we see no reason for complaint by defendants.

The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

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BERTIE E. HAYWOOD, Respondent, v. JACOB KUHN, Appellant.

St. Louis Court of Appeals, November 12, 1912.

1. **DAMAGES: Special Damages: Personal Injuries: Pleading: Sufficiency of Allegations.** A petition, in an action for personal injuries, alleging that " . . . her nervous system disordered, shocked and also greatly injured internally," sufficiently set out a claim for internal injuries, and hence proof of injury to the uterus was admissible.

2. **LANDLORD AND TENANT: Negligence: Injury to Tenant: Condition of Premises: Question for Jury.** In an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, whether the premises were in the same condition at the time of the accident as when rented, *held* a question for the jury; *held, further*, that whether plaintiff assumed the risk of injury, by reason of the premises being, to her knowledge, in the same condition when they were rented as when she was injured, was also a question for the jury.

3. ———: ———: ———: ———: **Contributory Negligence: Question for Jury.** In an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, whether plaintiff was guilty of contributory negligence, *held* a question for the jury.

4. ———: ———: ———: ———: **Instructions.** In an action against a landlord for injuries to the tenant's wife, caused by her stepping into an uncovered drain pipe on the premises, *held* that the negligence alleged in the petition was practically covered by the instructions summarized in the opinion; *held, further*, that the question of plaintiff's contributory negligence was covered by the instructions summarized in the opinion.

5. ———: ———: ———: ———: **Instructions: Commentary on Evidence.** Where, in an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, the evidence showed that the landlord was a nonresident and that the premises were in the immediate care of his son as agent, an instruction, that if the son, at the time of the accident and prior thereto, was the agent of the landlord and had knowledge of the condition of the premises a reasonable length of time prior to the date of the accident, his knowiedge was notice to the landlord, was not objectionable as an undue comment on the evidence, or as singling out a particular fact in evidence.

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6. **DAMAGES: Measure of Damages: Instructions.** An instruction on the measure of damages, in an action for personal injuries, that "if the jury find a verdict for plaintiff, you are, in estimating her damages, to consider any change in her physical condition which you may believe from the evidence resulted from the injury to her; the physical or mental anguish, if any, suffered by her on account of her injuries at the time of and since such injuries, as shown by the evidence, and such damages, if any, as you may from the evidence find it is reasonably certain she will suffer in the future therefrom; and you will find a verdict for such sum as in your judgment will under all the evidence reasonably compensate her for such injuries, including compensation for such sums of money, if any, as the evidence shows she herself has heretofore paid out for medicines, nursing and medical treatment, but not including any amount not already actually paid by her" sufficiently defines the measure of damages.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

AFFIRMED.

Geo. W. Lubke and *Geo. W. Lubke, Jr.* for appellant.

(1) The testimony tending to prove that the uterine trouble of the plaintiff is permanent was clearly incompetent. The petition contains no allegation of such injury or that the same is or will be permanent. This was not an issue in the case. Hartt v. McNeill, 47 Mo. 526. (2) The instructions directing a verdict in favor of the defendant asked by defendant should have been given. The property was in the same condition at the time of the letting to plaintiff's husband as it was at the time of her injury and she knew it and therefore assumed the risk of using the property in that condition. Moynihan v. Allyn, 162 Mass. 270; Quinn v. Perham, 151 Mass. 162; Shute v. Bills, 191 Mass. 433. In an action for damages for personal injuries, founded on negligence, the plaintiff cannot recover if his own negligence directly contributed to

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his injury. Holwerson v. Railroad, 157 Mo. 216; Boyer v. Railroad, 168 Mo. 583; Reno v. Railroad, 180 Mo. 469; McLeland v. Transit Co., 105 Mo. App. 473; Wallach v. Transit Co., 123 Mo. App. 160. Plaintiff's own want of care directly contributed to her injury and forbade a recovery on her part. McGinn v. French, 107 Wis. 54; Gallagher v. Button, 73 Conn. 172; Martin v. Surman, 116 Ill. App. 282; Purcell v. English, 86 Ind. 34; Vorrath v. Burke, 63 N. J. 188; Shackford v. Coffin, 95 Me. 69; O'Dwyer v. O'Brien, 43 N. Y. Supp. 815; Reams v. Taylor, 31 Utah, 288. (3) Instruction No. 2, given for the plaintiff, singles out the testimony of Edward Kuhn and is a comment on it to the jury and should therefore not have been given. Barr v. Kansas City, 105 Mo. 559; Smith v. Anthony, 96 Mo. App. 420. It singled out a particular fact in the evidence and gave undue prominence to it and was therefore erroneous. Eckhard v. Transit Co., 190 Mo. 593; Gharst v. Transit Co., 115 Mo. App. 403; Landrum v. Railroad, 132 Mo. App. 717. (4) Instruction No. 3, given for the plaintiff is clearly erroneous. It directed the jury in estimating her damages "to consider any change in her physical condition" resulting from her injuries. In this respect the instruction was not confined to the issues. Maguire v. Transit Co., 103 Mo. App. 459; Wallack v. Transit Co., 123 Mo. App. 160; State ex rel. v. Dieckman, 124 Mo. App. 653; Feddeck v. Car Co., 125 Mo. App. 24. It also directed the jury in estimating plaintiff's damages to consider "such damages, if any," as the jury might believe from the evidence it is reasonably certain plaintiff would suffer from her injuries in the future, without undertaking to define the term "such damages." In this respect the instruction again was not confined to the issues, was entirely too general and afforded the jury ample opportunity for speculation as to what damages the plaintiff might, in the future, sustain by reason of her injuries. Badgley v. St.

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Louis, 149 Mo. 122; Camp v. Railroad, 94 Mo. App. 272; Jacquin v. Cable Co., 57 Mo. App. 320; McGowan v. Ore & Steel Co., 109 Mo. 518; Hawes v. Stock Yards Co., 103 Mo. 60. This instruction was also misleading as to the measure of damages and should not have been given. Feiner v. Nichols, 158 Mo. App. 539; Zumwalt v. Air Line, 71 Mo. App. 670.

E. Rosenberger & Son and *Kurt Von Reppert* for respondent.

(1) There was no error in permitting the witness, Doctor George S. Jackson to testify that in his opinion the uterine trouble of the plaintiff was permanent. Plaintiff without objection had been permitted to describe her condition. So had the doctor. The averments of the petition were broad enough to admit the evidence objected to. If error was committed it was harmless. (2) Plaintiff's instruction No. 2 correctly declared the law and was no comment on the testimony. (3) Instruction No. 3 was a correct declaration of the law on the measure of damages and has received the approval of our Supreme Court. If the instruction is subject to criticism the giving of it was harmless error and would not warrant a reversal. Curtis v. McNair, 173 Mo. 270. (4) Defendant's demurrers at the close of plaintiff's evidence and at the close of all the evidence were properly overruled. Whatever may be the rule in other jurisdictions, in this State it has been well settled that where several portions of a property are let to different tenants, with a part in common for the use of them all, the obligation is imposed by law on the landlord to exercise reasonable diligence to keep such common portions of the property in a reasonably safe condition for such purposes as may reasonably be anticipated to be a proper use of the property, and for his failure to perform that duty the law attaches to the landlord liability for injury to such tenant or

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to a member of his family. McGinley v. Alliance Trust Co., 168 Mo. 257; Udden v. O'Riley, 180 Mo. 650; De Kalb Andrus v. Bradley Alderson Co., 117 Mo. App. 322; Herdt v. Koenig, 137 Mo. App. 588; Mascheck v. Klute, 133 Mo. App. 280.

REYNOLDS, P. J.—The husband of plaintiff in this case was the tenant of defendant, renting from him the upper rooms of an apartment house, in which rooms plaintiff and her husband resided. The lower rooms were rented to another family. To the rear of this apartment house was a yard, at the back of which were sheds and outhouses. A gate or opening led to an alley. This back yard and the outhouses were used in common by the several tenants of the apartment house. There was no made walk through the yard, the tenants throwing ashes and cinders from the rear of the house to the back of the lot in muddy weather. There were two sewer or drain pipes between the house and the vaults, one some twelve inches the other some five or six inches in diameter. The twelve-inch pipe projected some six or seven inches above the ground and was covered with what is described as a tin tub. The flange or rim of the six-inch pipe was broken off level with the surface of the ground on one side; a portion of it appears to have projected two or three inches above the surface. A loose flat rock was used as a cover for this six-inch pipe. The premises were in this condition when rented.

There is a good deal of conflict in the testimony as to the size and weight of this rock, but that point is not material now. It was in evidence that the rock which was provided for this smaller pipe often became displaced and the tenants and members of their families were in the habit of replacing it over this sewer or drain pipe. Plaintiff testified she had often done that herself.

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On the night of the 21st of October, 1907, plaintiff and a letter carrier, who was boarding with plaintiff and her husband, went out through this back yard and through the gate in the rear of the premises to go to a moving picture show on a street north of the premises. Returning from that and entering the premises through the rear gateway, plaintiff and her companion walking through the yard, plaintiff remembered that she had left some utensils out by the back fence. She turned back to get them to carry into the house. She had gone from six to eight feet away from her companion when he heard her scream. Going to her he found that she had fallen and that her right foot and limb had gone into this six-inch drain pipe and was so securely held that she could not withdraw the limb. Calling the tenants of the lower apartment to his assistance, they with considerable difficulty managed to extricate plaintiff's limb from the pipe, and her husband having joined them, they carried plaintiff into the house and up into her own apartment. She was confined to her bed for quite a length of time, and for a longer time to the house. While no bones were broken, she sustained a very severe sprain and was internally injured, the latter injury, as testified to by the attending physician, resulting in prolapse of the uterus, a permanent injury as testified by that physician. Plaintiff had paid the physician some twenty-five dollars for his attendance and had also paid a nurse or attendant $2.50 a week for some six or eight weeks that she was with her. Plaintiff's occupation had been that of seamstress and she earned about $1.50 a day. She testified that she had lost the effective use of her right limb, with which before then she had operated her sewing machine, and her earning capacity as a seamstress very greatly diminished. The physician testified that her injuries, both external and internal, in all probability were permanent. The plaintiff testified that the moon was shining, although not

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very brightly, on the night and at the time of the accident; that she saw the stone lying in the yard but supposed that it was in its usual place over the opening of the drain pipe and was not aware that the drain-pipe was open until she stepped into it.

At the conclusion of the testimony for plaintiff, and again at the conclusion of all the testimony, defendant interposed a demurrer, both of which were overruled. The jury returned a verdict in favor of plaintiff for $1750. Judgment following, defendant filed his motion for new trial as well as one in arrest of judgment. These being overruled and exception saved, defendant duly perfected appeal to this court.

The errors here assigned are to the improper admission of testimony and the refusal of the demurrers As to the latter, it is claimed that it clearly appeared that plaintiff's own want of care directly contributed to her injury and prevented a recovery on her part. and further, that it appeared that the property was in the same condition at the time of the letting to plaintiff's husband as it was at the time of her injury and that she knew it and therefore assumed the risk of using the property in that condition. It is also assigned for error that the court singled out the testimony of a witness and commented on it and had singled out a particular fact in the evidence, thereby giving undue prominence to that fact. It is further contended that the instruction given at the instance of plaintiff as to the measure of damages is erroneous and misleading. For these reasons it is urged that the motion for new trial should have been sustained.

Taking up these assignments in their order, we have to say as to the first one that it is untenable. It is founded on the claim that the physician who attended plaintiff should not have been permitted to testify that she had suffered the internal injury referred to. The averment in the petition as to the damages sustained is broad enough to have let in the testimony

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of this internal injury. To follow the language of the petition covering this particular point, it is set out that as the direct result of her fall, plaintiff's right ankle was "dislocated, sprained and badly wrenched, and that her body and right lower limb was bruised, scarred and injured and her entire nervous system disordered, shocked and also greatly injured internally, and that her injuries are permanent and incurable; that as a result of said injuries she is now a cripple and will be a cripple for life, and that she was made sick and sore and was confined to her bed for a long space of time, unable to help herself; that she has suffered and will in the future suffer great bodily pain and mental anguish, . . . and that her health and strength and ability to perform any kind of labor has been greatly and permanently impaired and destroyed." Counsel apparently are of the opinion that these words, "and also greatly injured internally," refer to her nervous system. Evidently that is not what was meant by the pleader or what would be ordinarily understood. The whole clause is, "and her nervous system disordered, shocked and also greatly injured internally." It is evident that the pleader intended to aver that plaintiff was also greatly injured internally. This idea may not be expressed very accurately; it would have been helped if after the word "disordered," the word "and" had been inserted, and between the words "and" and "also," the words "she was," had been interlined. But we think the language used was clearly intended to refer to internal injuries, not to nervous shock, and was sufficient to admit the evidence of injury to her womb, and it is of this latter that complaint is made.

In support of the second assignment of error on the refusal of the demurrers to the evidence and of an instruction to find for defendant, it is argued that the property was in the same condition at the time of the letting to plaintiff's husband as it was at the time of

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her injury and that plaintiff knew it and therefore assumed the risk of using the property in that condition, and hence she could not recover. That question of the property being in the same condition as when rented, was a question of fact for the jury. If defendant desired a specific instruction on it, he should have asked one—which he did not.

The cause of action pleaded is "that notwithstanding the character of the five-inch vertical pipe or shaft above as described in its manner of construction the defendant negligently and carelessly allowed said five-inch pipe or shaft to become out of repair and dangerous, in that the same was allowed to remain open and unprotected, and that the defendant well knew, or could have known the same by the exercise of ordinary care, in time to repair the same before the injuries to the plaintiff hereinafter complained of, and that the said five-inch vertical pipe or shaft aforesaid was in the condition above described at the time of the injuries hereinafter complained of, to-wit: on the 21st day of October, 1907."

We think the negligence charged was practically covered by instructions given. By one given at the instance of defendant, "The court instructs the jury that if from the evidence they believe that the pipe in question was kept covered by a stone and that said stone was a reasonably safe covering for said pipe to prevent persons from stepping into said pipe when using the yard in question for such purposes to which said yard was ordinarily put, then the jury will find for the defendant." It was further covered by an instruction given at the instance of plaintiff, and on which no error is assigned. By that instruction the court told the jury, among other things, that it was the duty of defendant to keep the yard in a reasonably safe condition for the purposes for which such yard was ordinarily used, so that the tenant and his family, while exercising ordinary care in its use, would suffer

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no injury; that if they found there was a sewer pipe underground between the vaults and the main sewer; that "the defendant, on the date herein mentioned, had and maintained a certain vertical pipe or shaft extending from the underground connection aforesaid, up and through the ground to the surface thereof, and that said pipe was hollow and open at the end and protruded from the ground; and if you further find and believe from the evidence that the defendant negligently permitted said pipe or shaft to remain open and without a reasonably safe covering to prevent persons from stepping into said pipe when exercising ordinary care in the use of said yard for such purposes to which said yard was ordinarily used and that the plaintiff while in the exercise of ordinary care and while using said back yard for the purpose for which it was ordinarily intended, stepped into, or slipped into said pipe and injured herself, then the court instructs the jury that your finding will be for the plaintiff, provided you further find and believe from the evidence, that defendant knew, or by the exercise of ordinary care might have known the condition of the opening of said pipe."

With these instructions before them the jury were practically required to pass on the very question on which counsel here assumes there was no evidence. The jury could only have found for plaintiff if they found from the evidence that the pipe in question had not been covered and kept covered by this stone and that the stone was not a reasonably safe covering for the pipe.

It is further argued in effect, in support of that assignment, that plaintiff cannot recover if she directly contributed to her injury. That proposition is beyond question, and as will be seen by the instruction quoted, given by the court at the request of plaintiff and not here challenged, that matter was sub-

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mitted clearly and distinctly to the jury. It was further covered by an instruction given by the court of its own motion, "that it was the duty of plaintiff in using the yard in question to exercise such care as an ordinarily prudent person using said yard would have used under the same circumstances under which plaintiff was using the same at the time described in the evidence, and if the jury find from the evidence that the plaintiff failed to use such care at the time she was injured, then the jury will find a verdict for the defendant." By other instructions given by the court of its own motion, the jury were correctly instructed as to the meaning of ordinary care and were further told that "the burden of proof is on the plaintiff to establish by a preponderance of the evidence the facts necessary for a verdict in (her) favor under these instructions, except upon the issue concerning the exercise of ordinary care by the plaintiff. As to that issue the burden of proof is on defendant to show the want of such ordinary care on the plaintiff's part." No error is assigned before us to the giving of any of these instructions. We think this error now assigned here is untenable.

The third assignment of error is to the second instruction given at the instance of plaintiff. That instruction, in substance, told the jury that if they found from the evidence that Edward Kuhn, at the time of the accident and prior thereto, was the agent of defendant for the purpose of looking after and making any necessary repairs as might be reasonably required on the premises, then the court instructed the jury that if they found and believed from the evidence that Edward Kuhn had knowledge a reasonable length of time prior to the date of the accident that the opening of the pipe was not reasonably well protected to prevent a person who was using the yard for the purposes for which it was ordinarily intended and while in the exercise of ordinary care from stepping

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into or slipping into the pipe, then the knowledge on the part of Edward Kuhn was notice to his principal, the defendant. It appeared that the defendant himself was a nonresident of this State and that this property was in the immediate care of his son Edward Kuhn, the witness here referred to. We do not think that this instruction was incorrect either as an undue comment on the evidence or in singling out a particular fact in the evidence and giving undue prominence to it as claimed by counsel for appellant.

The most serious and strenuous argument of the learned counsel for appellant, however, is directed to the instruction which the court gave as to the measure of damages. That instruction, numbered 3, so far as pertinent to this assignment of error is as follows:

"The court instructs the jury that if you find a verdict for the plaintiff you are, in estimating her damages, to consider any change in her physical condition which you may believe from the evidence resulted from the injury to her; the physical or mental anguish, if any, suffered by her on account of her injuries at the time of and since such injuries, as shown by the evidence, and such damages, if any, as you may from the evidence find it is reasonably certain she will suffer in the future therefrom; and you will find a verdict for such sum as, in your judgment, will under all the evidence reasonably compensate her for such injuries, including compensation for such sums of money, if any, as the evidence shows she herself has heretofore paid out for medicine, nursing and medical treatment, but not including any amount not already actually paid by her."

We have very carefully examined the cases cited by learned counsel for the appellant and which they claim condemn this instruction, but are unable to find that it violates any of the rules laid down in any one of those cases. Comparing this instruction with the instruction which was given in Curtis v. McNair, 173

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Mo. 271, 73 S. W. 167, that instruction being there set out on page 290 and designated as instruction B, we are unable to perceive any substantial difference between this instruction here given and that in the Curtis case, which was distinctly approved by our Supreme Court. The difference between the two instructions is a mere verbal difference, in no way whatever changing the meaning or altering the rule as announced in Curtis v. McNair, supra.

Finding no error to the prejudice of defendant, materially affecting the merits of the case, the judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

MASON CREASEY, Appellant, v. CARRIE B. CREASEY, Respondent.

St. Louis Court of Appeals, November 12, 1912.

1. **DIVORCE: Desertion: Efforts at Reconciliation.** Where a husband abandons his wife without cause, it is necessary for him to show, in order to entitle him to a divorce on the ground that the wife was guilty of desertion, under Sec. 2370, R. S. 1909, in refusing to return to and live with him, that he offered in good faith to effect a reconciliation and to return to her or take her back, that she refused his offer, and that such refusal continued for the statutory period of one year.

2. ———: ———: ———. Where a husband abandons his wife without cause, he will not be heard to charge her with desertion on the theory she refuses to return to him, unless he seeks a reconciliation and offers to return to her or take her back; and such offer must be made with the bona fide intention of bringing about a reconciliation and not merely as a device to defeat her in divorce or maintenance litigation.

3. ———: ———: **Effect of Acquiescence.** In order to warrant a divorce on the ground of desertion, under Sec. 2370, R. S. 1909, the defendant must have been absent from the plaintiff without the consent of the latter, for the full period of one year.

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4. ———: ———: **Efforts at Reconciliation: Refusal: Sufficiency of Evidence.** In an action by a husband for divorce, prosecuted on the theory that, after he had wrongfully abandoned his wife, the latter refused an offer he made to become reconciled and live together thereafter, evidence *held* to show that the wife did not refuse a proper offer of reconciliation a year before the suit was brought, and that, therefore, she was not guilty of desertion, under Sec. 2370, R. S. 1909.

5. ———: ———: ———: **Effect of Insincere Efforts.** Where a husband abandoned his wife without cause, the fact that he made insincere offers to effect a reconciliation must be considered in weighing the integrity of subsequent offers made within a year after the abandonment, but does not conclude the matter, since, under the law, the "door of repentance and return" must be kept open to him for a year.

6. ———: ———: ———: **Bona Fides of Efforts.** An offer of reconciliation made by a husband who had abandoned his wife is not to be condemned because made by letters; and the fact that he kept copies of such letters would not conclusively establish that he was insincere in making the offer, although it was a circumstance pointing in that direction.

7. ———: ———: ———: ———. Where a husband, after abandoning his wife without cause, made a sincere offer to take her back, intending, if she accepted, to perform his marital obligations, the fact that the cause moving him to make the offer was a desire to avoid the rendition of a judgment for separate maintenance for the wife in a suit then pending, would not diminish the legal effect of his offer.

8. ———: ———: ———: ———. Where a husband, after abandoning his wife without cause, made numerous efforts to effect a reconciliation, which were rejected by the wife, he was justified in requiring, as a condition of his acceptance of an offer by her to return to him, made shortly before the day a suit for separate maintenance brought by her was set for trial, that she dismiss said suit, and his previous offers to take her back should not be stamped with insincerity because of this insistence.

9. ———: ———: **Efforts at Reconciliation: Effect of Rejection.** Where a husband abandons his wife without cause, his genuine offer to return and renew cohabitation, made before a year elapses, will break the desertion and will prevent the wife's obtaining a divorce on the ground of desertion, under Sec. 2370, R. S. 1909.

10. ———: ———: ———: **Bona Fides of Efforts.** Where a wife, whose husband abandoned her, instituted suit for separate maintenance, alleged offers in her motions for attorney's fees.

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that she was at all times ready to resume marital relations, not being made as offers but as excuses for demanding money, should be disregarded in determining whether or not the husband had made a genuine effort to effect a reconciliation, so as to defeat the wife's action for divorce on the ground of desertion.

11. ———: ———: **Effect of Acquiescence.** A husband's wrongful abandonment of his wife does not constitute desertion, under Sec. 2370, R. S. 1909; if, within one year thereafter, she showed by her words or conduct that she acquiesced in the separation.

12. ———: ———: **Efforts at Reconciliation: Effect of Rejection.** Where, prior to a husband's wrongful abandonment of his wife, he had not been guilty of conduct justifying a divorce, the wife could not refuse to accept genuine offers made by him to effect a reconciliation because of his conduct prior to the separation, and she could not, by remaining away from him, as a consequence of such refusal, create a right to be divorced on the ground of statutory desertion.

13. ———: ———: ———: ———. In an action for divorce, *held* that the evidence showed that the husband, within one year after he had wrongfully abandoned his wife, had made a genuine offer to effect a reconciliation and renew cohabitation with his wife, and that she refused his offer, and hence it is *held* that the wife was not entitled to a divorce on the ground of desertion, under Sec. 2370, R. S. 1909.

14. ———: ———: **Effect of Acquiescence.** In an action for divorce, *held* that the evidence showed that, within one year after her husband had wrongfully abandoned her, the wife showed by her conduct that she acquiesced in the separation, and hence it is *held* that she was not entitled to a divorce on the ground of desertion, under Sec. 2370, R. S. 1909.

Appeal from Pike Circuit Court.—*Hon. W. T. Ragland,* Judge.

REVERSED AND REMANDED (*with directions*).

Barclay, Fauntleroy & Cullen and *Fry & Rodgers* for appellant.

(1) The review of a suit for divorce on appeal is governed by the rules applicable to equity cases and extend to the law and the facts. Schuman v. Schuman, 93 Mo. App. 99. (2) The decree in favor of defendant granting a divorce to her ought not and

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cannot stand because her refusal when requested to live with appellant constitutes consent on her part for appellant to live apart from her, and she cannot be heard to say he deserted her. Youngs v. Youngs, 78 Mo. App. 225; Droege v. Droege, 52 Mo. App. 84. (3) When a wife remains away from her husband without his consent, and upon his request made in good faith for her to return and live with him, refuses to do so, she is not entitled to a divorce on the ground of desertion. Schuman v. Schuman, 93 Mo. App. 104; Louis v. Louis, 134 Mo. 566; Thomas v. Thomas, 152 Ill. 577; Hair v. Hair, 10 Rich. Eq. 163; McMullin v. McMullin, 123 Cal. 653; Schroeder v. Schroeder, 26 Ill. App. 524; Kenley v. Kenley, 3 Miss. (2 How.) 751; Briggs v. Briggs, 24 S. C. 377; Crow v. Crow, 23 Ala. 583; Jerolaman v. Jerolaman, 54 Atl. (N. J. Eq.) 166; Hanberry v. Hanberry, 29 Ala. 719; Fellows v. Fellows, 31 Mo. 342; Hooper v. Hooper, 24 N. J. Eq. 93; Whelan v. Whelan, 183 Pa. 293; McGowan v. McGowan, 50 S. W. 399; Gilbert v. Gilbert, 5 Misc. Rep. 555, 26 N. Y. Supp. 30; Chipchase v. Chipchase, 48 N. J. Eq. 549; Provost v. Provost, 63 Atl. (N. J. Eq.) 619. (4) The refusal of respondent to live with appellant was unjustifiable and continuous for more than a period of one year before the filing of his petition for divorce. This entitled him to have the prayer of his petition granted. Ashburn v. Ashburn, 101 Mo. App. 365; Louis v. Louis, 134 Mo. App. 566; Schuman v. Schuman, 93 Mo. App. 99; Messerger v. Messerger, 56 Mo. 329; Neilson v. Craig, 175 Mo. l. c. 405; Hooper v. Hooper, 34 N. J. Eq. 93.

D. A. Murphy and *Clarence A. Barnes* for respondent.

(1) The appellate court gives due weight to the findings of fact by the trial court in divorce cases, even though expressed by a general conclusion. Schuman

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v. Schuman, 93 Mo. App. 99. When one suing for a divorce proves facts entitling her to a divorce, the court has no power or discretion to deny it. Meyer v. Meyer, 158 Mo. App. 299; Hamburg v. Hamburg, 147 Mo. App. 591; Ryan v. Ryan, 156 Mo. App. 655. (2) The circuit court has properly granted a divorce to respondent on the ground of abandonment and desertion, because it is expressly admitted in all of his evidence by appellant himself and on the very date appellant has contended he was seeking a reconciliation, he then had pending in the circuit court of Audrain county a petition asking that he be decreed a divorce and his purported overtures, visits, copied letters and post cards, were properly found by the trial court not to have been made in good faith, and for the purpose of effecting a reconciliation. Parker v. Parker, 42 Atl. 160; McKean v. McKean, 5 Atl. 799; Olcott v. Olcott, 26 Atl. 469; Musgrave v. Musgrave, 39 Atl. 961; Johnson v. Johnson, 16 N. E. 891; State v. Williams, 136 Mo. App. 304. (3) The record in this case nowhere shows respondent refused to accept an offer made in good faith to live with appellant, but on the contrary shows that when she was deluded into believing that an offer had been made in good faith, she accepted the caresses of appellant, and was ready and would have accepted a sincere offer in good faith to return to him. But a mere offer to live with respondent and support her does not entitle appellant to a decree for divorce and bar respondent's cross-bill because neither respondent nor the courts are required to believe that such an offer was sincere. Porter v. Porter, 44 N. E. 740; Wilson v. Wilson, 67 Ill. App. 522; Spengler v. Spengler, 38 Mo. App. 266; Louis v. Louis, 134 Mo. App. 566.

STATEMENT.—Suit for divorce, wherein plaintiff was denied a divorce and defendant was granted one

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under the testimony on her cross-bill, with $2500 alimony in gross. Plaintiff has appealed.

The statutory grounds for divorce stated in the petition are (1) that defendant absented herself without a reasonable cause for the space of one year; (2) that she offered such indignities to plaintiff as rendered his condition intolerable, particularizing. In her cross-bill, defendant states against the plaintiff the statutory ground of offering her such indignities, etc., particularizing. She also makes an allegation, which the trial court treated as a sufficient charge, that defendant absented himself without reasonable cause for the space of one year, as follows: "That plaintiff disregarding his duties as the husband of the defendant, did on or about the 21st day of July, 1909, without any cause or excuse whatsoever, and against the desire and without the consent of defendant, deserted and abandoned defendant, and since said date has ever failed, neglected and refused to support and contribute to the support and maintenance of defendant and to make any provision therefor, other than to permit her to occupy one of his tenement houses and a special allowance provided for a short period of time by the court in a former and other cause."

With a view to determining whether it justifies the decree, we have carefully examined the evidence, which occupies over six hundred and sixty pages of the printed abstract. As a result thereof, we adopt certain of the findings of fact embodied in the decree of the circuit court, as follows:

"The court finds that plaintiff and defendant were married at Mexico, Missouri, on the 17th day of April, 1907, and continued to live together as husband and wife from that date until the 21st day of July, 1909. That plaintiff and defendant from the date of their marriage until the latter part of January, or first of February, 1909, faithfully demeaned themselves and that each treated the other with kind-

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ness and affection. That during the latter part of January, or first of February, 1909, for some reason not disclosed by the evidence, a coolness sprang up between them and their relations became estranged and from that time on until their separation on the 21st day of July, 1909, there were mutual acts of retaliation and recrimination tending to alienate and destroy their mutual affection; but the court finds that all of the acts and conduct on the part of each of them whether taken singly or together, did not constitute such indignities as to render the condition of either of them intolerable within the meaning of the statute so as to entitle either of them to a divorce on the ground of indignities alone. The court further finds that from the date of the marriage of plaintiff and defendant until the 16th day of July, 1909, they lived in a large and well-furnished residence located in a desirable residence district in the city of Mexico, Missouri. That on the 16th day of July, 1909, the plaintiff, with the intention of getting defendant out of his home and with the intention of abandoning her, after having so done, furnished a small house in a different part of said city of Mexico and removed his family, including plaintiff, thereto. That on the 21st day of July, 1909, and without any change in the general relations then existing between plaintiff and defendant and without any previous notice or warning to defendant, plaintiff without legal cause or excuse deserted defendant and on the same date instituted in the circuit court of Audrain county, Missouri, his suit for divorce."

We may, at this point, add to the foregoing, that the divorce suit last mentioned was voluntarily dismissed by the plaintiff on the 29th day of September, 1909, on which day the plaintiff had offered to resume marital relations with the defendant. On November 9, 1909, the defendant instituted a suit for separate maintenance in the circuit court of Audrain county,

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Missouri, which said suit was pending and undisposed of until November 9, 1910, during which time, however, and thereafter, from time to time, the plaintiff made offers of reconciliation and to resume marital relations with the defendant, which she did not accept or act upon.

The only question which we deem necessary to consider at greater length in this opinion is whether either of the parties is entitled to a divorce on the ground of desertion. That depends upon the sincerity of plaintiff's offers of reconciliation, and upon whether, by her words or conduct, subsequent to his leaving her, she acquiesced in the separation continuing. In these respects the evidence discloses the following facts:

On September 29, 1909, while his first divorce suit was pending, the plaintiff called at the defendant's house. A Mrs. Tucker was there talking to the defendant. She had come before she had her breakfast, though she lived about four blocks away, and she stated that fact to defendant. It appears to have been the first time plaintiff called since he left his wife. Prior to that time all his efforts seem to have been directed toward procuring a dissolution of his marriage. Whether he and Mrs. Tucker met there by prearrangement so that she might serve as a witness is a question. Plaintiff and Mrs. Tucker testify that, on the evening before, he had asked her to call for the purpose of ascertaining whether his wife would talk to him. They both assert that neither had any idea of finding the other there. She says that she called twice the evening before and failed to find defendant in. Defendant testifies, in effect, that Mrs. Tucker did not make those two calls; that she was home at the time they were said to have been made. Plaintiff does not explain why he did not postpone his visit until he heard finally from Mrs. Tucker as to his wife's willingness to talk with him.

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Defendant's version of what occurred on this occasion is as follows: Mrs. Tucker told her that plaintiff had been to her (Mrs. Tucker's) house the night before and wanted to know if defendant would have a talk with him. Defendant said, "I don't know, I haven't really recovered from the way Mr. Creasey has done me to have a talk with him." Then, seeing her husband approaching the house, she said to Mrs. Tucker, "There comes Mr. Creasey and I don't feel like I want to talk with him yet awhile." Mrs. Tucker answered, "If I didn't want to see him I wouldn't go to the door." She did not go to the front door when he rang the bell and he came around to the kitchen door and asked her if he could come in. She told him it was his house. He came in and said, "Mamma, I have come to have a talk with you. I want you to forgive this and let's go back." He threw his arms out to her saying, "Mamma, I have come to acknowledge I have done wrong, come to my arms and let me hug and kiss you." She answered, "Mr. Creasey, I can say to you as you said to me time without number, that you need not come to me." Then he said, "Now you see Mrs. Tucker." Defendant said, "Now you see Mrs. Tucker, wasn't there a plot you two should meet here this morning?" Mrs. Tucker said "Oh, no." He then said, "Mamma, your nieces are coming this month, I want you to come back home with me to the big house so we can entertain her in the big house." She answered that her niece would be entertained wherever she was. Then he said, "Come on, quit your foolishness." She answered that there was no foolishness with her; that she could not forgive yet; that she would have to have time. He asked her how much time. She said all that she wanted; that he had caused a wound in her heart it would take a long time to heal; that he had not only humiliated her but her father by having him arrested. Then she turned to him and said, "What would you give to have me back?" He

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pointed to his breast and she answered, "Oh, is that all? Mr. Creasey, should I come back to you, you will have to meet conditions that you don't think you will have to meet." She says that ended the interview.

Plaintiff testified as to this first alleged attempt to effect a reconciliation, that when he came into the house he told her he wanted to have a talk with her; that he saw she had company there and that he wanted to talk to her alone. That she said, "No, she wanted a witness." "Very well," he said. Then followed his version of the conversation which is, in substance, like hers, except that he says she told him he would have to deed her enough property to keep her as long as she lived. Mrs. Tucker's testimony corroborates his. We may add here that when plaintiff's suit for maintenance came on for trial Mrs. Tucker appeared as a very friendly witness to plaintiff, having come voluntarily from Denver, Colorado, where she was then living, for the purpose of testifying on his behalf. It may also be said that before she went to Colorado her conduct, if defendant's testimony is to be credited, savored of intermeddling in the affairs of this couple.

Plaintiff caused his then-pending divorce suit to be dismissed on that day. Defendant heard of this in a day or two. The divorce suit was then reinstated at her instance in order to have her motion for attorney's fees, which was pending at the time of the dismissal, passed on. It was then finally dismissed. He does not appear to have communicated further with his wife until October 28, 1909, when he sent her a letter by registered mail. It was excluded from evidence on the ground that it was a privileged communication, and it is not preserved in the record.

Plaintiff testifies that he sent Will Steele, her intimate friend, to see her. In his answer filed in the maintenance suit plaintiff states that he sent a friend of hers and his, referring, we infer, to Steele, "to get

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her decision," meaning her decision on his offer made in the presence of Mrs. Tucker. Defendant admits that in the winter or fall of 1909, Steele spoke to her about returning to her husband, but says that when she asked him if he had been sent to see her, he said, "No." What she said to Steele is not disclosed.

She filed her suit for maintenance on November 9, 1909. In his answer, filed in that suit on November 30, 1909, plaintiff admits that he had brought suit against her for divorce, but charges that it was on account of "the acts and conduct of plaintiff." He then sets up his alleged efforts to resume his marital relations and obligations, and further says: "And even now comes defendant and affirms his proffers to this plaintiff, and agrees to take her back and support her if she will come and live with him; and that there is no necessity for her to work for a living, if she has done so, and no necessity for her to have to employ lawyers to get her the necessities of life, but that this defendant is now and has been since first making the proposition to her, ready, willing and able to take her back as his wife." In her reply, filed June 13, 1910, she stated in response to this renewed offer, first, that it was not made in good faith; second, "that there is such an incompatibility in the temperment, disposition and purpose in life between the plaintiff and defendant that a renewal of the marriage relationship would result in a repetition of the same or similar indignities stated in the plaintiff's (her) petition."

There were two hearings had in the maintenance suit, the first ending June 15, 1910, and the second about November 9, 1910. At the end of the first hearing, the court laid over the case or withheld its decision to give the parties an opportunity to become reconciled. Thereupon plaintiff, the husband, caused his wife's uncle, J. A. Vaughn, who was friendly to her, to go and ask her to come back and live with him. This

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was in June, 1910. She says that she does not remember what she told her uncle. The uncle testified that she answered, "Not yet, she couldn't." He asked her why; and she said, "You don't know it all, he has even had men to watch my house." (We may say here that this "watching" was done by a deputy sheriff on one occasion at plaintiff's instance to ascertain what lawyer defendant was conferring with. It was not intended as a reflection on defendant's conduct and was not so construed by any one.) Plaintiff testified that he sent defendant's pastor to see her in an effort to have her come back. She admits that the pastor celled and said something about her coming back to her husband. That she said, "Brother Truex, you don't know all, he hired a man to watch me." She testifies that he told her that her husband had not sent him. When the pastor called is not disclosed.

Shortly after the first hearing of the maintenance suit, the plaintiff made a two weeks' visit to Texas. Defendant admits that he called upon her before going, though it is not disclosed what occurred then. While in Texas he wrote her as follows:

"Worthom, Texas, July 10, 1910.

"Mrs. Carrie Creasy,

Mexico, Mo.,

"Dear Wife in writing you at this time I hardly know how to commence or what to say under the circumstances. Now if I knu you would answer and be nice to me I would surely know better what to say and would feel better about it after I had said it. But I can and do hope for the best this is sunday morning and it is nice and cool and all are well and happy but myself I will go to sunday school as I havent missed a sunday this year this is a fine place good crops and plenty of everything peaches plums in fact fruit of all kinds as well as fried chicken are ripe here and a mocking bird has a nest in fathers yard and the old bird came and sit in a tree close to my bedroom windo

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about day light this morning and sang to me for moore than an hour it was just grand and I am sure if you had of been with me you would of enjoyed it too. and I am sure it would of sounded much sweeter to me. For you are as usual on my mind all the time I do certainly wish you had come with me as I tried to get you to I am sure we both would be happier at least I know I would and I believe you would for I do not see how you can be happy the way things are now I am sure if you will come back to me and we both drop our past troubles and neither one of us never mention the past troubl to the other I am sure we can always get along and be happy for ever. Now don't you think so? Now write and tell me yes and that you will come to me for in spite of all that has been done and said I still love you. Now you just stop listening to others and come to me and see if I dont do as I said I would do. I hope you have been thinking over the two little talks I had with you before I left Now you would not say if I could come to see you any more or that you would let me in or that you would talk to me if I did come and above all you would not say that you loved me not even a little bit. Now write me at once and say yes I do and will to all of them and I will come to you just as soon as I get to Mexico for I am always lonesome without you and I forgive you for all that has been said or done and I want you to do me the same way I know you said you never would be a wife to me any moore like you had been once but you surely did not mean that Now did you. Please answer this at once and say to me I was only joking and did not mean it Now I could and I would write you a long letter if I only knew you would receiv it in the same spirit of earnistness which it was written and answer it. I know we are not going to live always so let us both live in the future so that when our time does come we will not be ashamed or afraid to go to be judged by him who

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will judge all of us according to the deeds done in the body and in closing this letter I want to say to you this much. you are the only little woman in this world I love and the only one I ever expect to love and I want you to believe me in all seariness and write to me so I can get your letter by saturday sure.

"Lovingly yours with many kisses

Mason.

"P. S. I have just been out in the country where they had plenty of watermelons muskmelons and fruit of all kinds We sure had a big time the girls ar canning fruit and making jelly and paservs to beat the band they all live on farms and have plenty of everything My appitite is good and everything tastes good to me I have gained six pounds since I talked with you as there is plenty of melons fruit and fried chickens here I hope to continu to improve in flesh for some time yet. and I believe if you will only write me the right kind of a letter I will get fat I am going south of here next week a few days to look for a new location to go into business and hope to please you what ever I do anyone can do well here if he will only hustle and I always have hustled and can yet if you will love and encourage me for I know you should ayway and belve you will

M "

This she answered as follows:

"Mexico Mo July 13 1910.

"My Dear Husband

"I have received your letter and have read and reread it so often that I can almost quote it, it seems to true that you have already forgotten the way you imposed on me, and I cannot help feeling that like the mocking bird you are writing your lesson in imitation of the bird rather than as the originator of the music.

"I am glad that your health is improving and you are gaining in weight and if you will keep that up for

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a fews months longer, and continue you lesson it is possible you may perfect your plans.

"My heart is indeed broken and I feel that I am entitled to your love and affection and would give all the world for it, but somehow my intuition keeps telling me that it would never do, for you, have long since made up your mind to discard and humiliate me.

"I must close for I tremble so as I write this, and I do not want to say anything to discourage either of us in an honest effort to forget our differences.

"Yours in haste
Carrie"

He also wrote to her while there as follows:

"Wortham Tex July 1910

"My Dear Little Wife Mysterious you are still as great a mystery to me as ever. Now don't you rember back in 1906 before we were married I wrote you a love letter and pictured to you three kinds of trouble 1st the trouble you had already had 2nd the trouble you have and 3rd the trouble you are looking for. Now havent you had trouble enough. I am sure I have. Now it always will be a mystery to me why you turned against me and treated me the way you have I am sure I was good to you and no man ever did love a woman any better and was moore affecionet than I was to you, and I have asked you to forgive me for any thing that I have done that displeased you now it seems you have no love for me at all not even a kind word and all this time you know I do love you with all my heart. Now you said you got my letter but you did not answer it at all you only mentioned the mocking bird Now mama you try it again and see if you cant answer this one with a long letter and tell me I can come and talk with you and you will say something encouragin to me when I do come. Now mama I am sure you will feel better over it if you do. Now you seem anxious for me to stay here several

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months longer how can you say that when you know how anxious I am to see and love you. you spoke of the broken heart. yes my heart is broken and all for the love of you and you say you feel you are entitled to my love and effection and would give the world for it. When you know you had it every day yes every minute when you for some unknown reason to me threw it away just as if it was some uncard for toy. and even now when it is being offered to you again you are not only refusing it but seem to spurn it when you know it comes from an honest heart and with all searsness you did not say you would like to be with me or that you would like for me to be with you. I thank you for your prompness in writing me and do hope you will be as prompt in ansuring this one. Now mama as you did not ask me to answer your letter I am taking the liberty just as I did in writing you the first time and hope you will answer this one as promply as you did the other one so you think you could give the world for my love and affection But your intuitions keeps telling you not to except either for it would never do Now you just listen to me and you come to me and stop listening to your intuitions and evry one else and we will both be happier I have always believed it was other talk and influence over you that was the cause of your doing the way you have. and I believe if others would let you alone even now you would come and be the sweet little wife to me you once was oh how I did love you and always will. you say you do not want to say anything to descourage either of us in trying to forget our differences are you trying to forget our difference if you are an honest effort will clear the way I have already made.

"the honest effort and the way is clear Now forget the past and writ me a long letter. so with lots of love and many kisses for you I am always your affectionally

"MASON."

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While in Texas he also sent her a post card, dated July 7, 1910, stating in substance that he had arrived the night before all right and had a nice trip, etc., and ending with: "With love and best wishes to you." Under date of July 13, 1910, he sent her a post card containing the printed words, "I love but thee." From Mexico, Missouri, he sent several post cards to her at Springfield. Among these, one dated August 10, 1910, bore the printed legend, "Please don't keep me waiting." Another, undated, had printed on it, "Some one longs for some one." On this card he wrote, "Better love and lost than never loved at all." Another, dated August, 1910, had printed on it, "If a body write a body and get no reply, may a body ask a body just the reason why?" On September 8, 1910, he sent her a post card from Colorado. About September 21, 1910, he sent her a post card on which was printed, "You're the only girl I ever loved—but I can't keep telling you so, all the time." Across this he had written, "True as gospel." On September 25, 1910, he sent her a post card on which was printed a poem to the general effect that a man was his own best friend and that he should be good to himself. On August 13, 1910, she sent him a postal from Springfield on which was printed, "What's the use of loving if you can't love all the time?" On October 16, 1910, while he was in Mexico, Missouri, he wrote a letter to her, as follows:

"Mexico, Mo. Oct. 16, 1910.

"My Dear Wife

"I hope you will pardon me for taking the liberty of writing you at this time for my thoughts are continually of you. Now I know you do love me. or you would not put your arms around my neck and kiss me so sweetly and so many times and talk so loveing as you did to me last Sunday night.

Now I have told you I would always love. Treat you right and do everything in reason for you go anywhere

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with you and that I would take you back here where I live or I would come to you where you live. Now what more can I do if you can think of anything moore please tell me what it is. you seemed just a little out of humor the other night when I walked home with you. Now I would like to have one moore private talk with you and if I cant induce you to become reconsiled and live with me I will hafto give up for I have made so many personal appeals to you to come back and every time I have had to axcept no for an answer. Now if you will write and tell me I can. I will come and take you to lodge Tuesday night or I will take you home from lodge which ever you say Please write and tell me if either one suits you. We can then have a long talk togather and I do hope good results may follow please answer. Lots of love and many kisses for you.

Yours

MASON."

Plaintiff kept copies of the letters he wrote to the defendant. These letters were admitted in evidence over the objection of the defendant that they were privileged communications, on the theory that she had waived the privilege by withdrawing the objection to them at the trial of the maintenance suit. In addition to sending her these letters and post cards, he went to her house to talk to her fifteen or twenty times. On the objection of her counsel that it was a privileged communication, plaintiff was not permitted to give his version of what was said at these interviews. She also wrote him several letters, which were not permitted to be introduced in evidence because of the same objection advanced by her counsel. However, in her testimony she admits that on November 5, 1910, "He had been coming down there for months for me to go home with him," that is, since in June, 1910. Being asked by her counsel what plaintiff said to her when he came to see her, she said, "Well, he would say come

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on and go with me or let me stay with you." The Court: "And you declined, you refused to do that? A. No, I didn't come right out and refuse." There is no doubt, however, that she did not go back. She admits that at the time of the first hearing in the maintenance suit she could not see her way back to her husband, stating that this was because he treated her so cool when she "offered to return."

It does not appear that she had ever offered to return except that her attorneys, in a motion for allowance of costs and attorneys' fees, had stated as "grounds thereof . . . that she willingly forgives the defendant (now plaintiff) for those unhappy differences which impelled her maintenance of the present suit, and purposes to faithfully discharge all of her duties as the wife of defendant." (The court had already allowed her attorneys $150 as a fee.) After the first hearing of the maintenance suit, and while the plaintiff was endeavoring to effect a reconciliation with her, her attorneys filed another motion in said suit which stated "that an honest effort is being made by plaintiff to secure an amicable adjustment of the differences now existing between the plaintiff and defendant, . . . that in order that the question of costs in this case up to the present time and the fees of the attorneys therein may not be in any manner construed as operating in restraint of an amicable adjustment of said matters between the parties, the said attorneys respectfully ask the court" to allow the costs theretofore asked for and $750 attorneys' fees, and require the defendant (now plaintiff) to pay the same forthwith.

On October 6, 1910, both the parties went to Springfield, Illinois, to attend the State Fair. She had previously told him that she was going. Though they went on the same train, they did not go in each other's company. He went alone; she went in the company of two ladies, one a Mrs. Botkins. Arriving at Spring-

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field, he twice in the railroad station tried to get her to go with him to his sister's, who lived in Springfield, with whom they had stayed on a similar occasion two years before. She told him that the ladies were with her. He suggested that they go too, his sister having plenty of room. She refused. The next day he met her and her party at the fair grounds and talked to her again. While talking to her, Mrs. Botkins came up and said, "Mrs. Creasey are you going with Mr. Creasey or with us," to which she answered, "I am going with you." Mrs. Botkins then said, "If you are going with us come on, and if you are going with Mr. Creasey let him take you like a man." Plaintiff said, "That's exactly what I am trying to do." Defendant would not go, though, she says, when he made these advances he was pleasant and gallant. She did say, however, that though he asked her to go with him to his sister's that night, he did not then ask her to come and live with him again.

She says that after the Springfield incident and before the maintenance suit was finally determined, he came to see her at least on two or three different occasions, spending as much as an hour alone with her. A single isolated instance of her personally offering to go with him is testified to by defendant as having occurred on November 5, 1910, four days before the maintenance suit was to be called for final hearing, and about 9:30 o'clock at night. She told the story of that night under the assumption that all she told occurred in the presence of her boy and then disclosed that nothing was said in the presence of the boy except that plaintiff shook his finger in her face and said, "Not until you promise me you will go with me Monday morning." Going to the door then, he kissed her and said, "Goodbye, I will be here Monday morning." The trial judge then indicated that he would consider only the fragment of the occurrence which the boy is said to have witnessed, following the theory

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which defendant had invoked, that overtures for reconciliation not made in the presence of a third person were privileged communications. We will, however, mention the excluded story here. She states that she offered to go home with him that night. At first he hesitated, asking her what made her take the notion. Then he said, "all right," he'd go and see that the house was prepared for her coming. He returned in about fifteen minutes and asked her whether she would go with him Monday morning to get the records clear of the maintenance suit. This she refused to do, and then he would not take her unless she would promise, which she would not do. Asked on cross-examination why she refused, she said that she "owed the man no promise." She did not explain how he came to kiss her good-bye and to promise to be back for her Monday, immediately after reaching this unpleasant deadlock. Plaintiff, on cross-examination, denied the occurrence and says that she only offered to go providing he "did certain things."

The separate maintenance suit was decided against the wife on November 9, 1910. Thereafter on three occasions plaintiff tried to talk with his wife and she avoided him. Once he called at her house and she did not come to the door, though the indications were that she was in. He waited and tried to speak to her on the street as she came out of the house, but she passed on and refused to talk to him. Another time she avoided him when he asked to walk home from church with her. In the meantime she appealed from the judgment against her in the maintenance suit. We decided that appeal at this sitting. [See Creasey v. Creasey, 168 Mo. App. 98, 151 S. W. 215.] He filed this suit for divorce on December 14, 1910.

CAULFIELD, J. (after stating the facts).—We approve of the action of the trial court in denying plaintiff a divorce. It is conceded that the plaintiff

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left his wife voluntarily, and the trial court has found that neither party had been guilty of misconduct sufficient to constitute a cause for divorce, a finding which we approve. It was incumbent upon him, then, if he would justly charge her with statutory desertion, to seek a reconciliation and offer to return. Such an offer must have been made in good faith, that is, with the bona fide intention to bring about a reconciliation and not merely as a device to defeat her in litigation. [Nelson on Divorce and Separation, sec. 73; Messenger v. Messenger, 56 Mo. 329.] If the plaintiff made such an offer in good faith and she refused and her refusal continued for the statutory period of one year, he would be entitled to a divorce; not otherwise. She must be taken under the circumstances to have been absent by his consent until he offered to return or take her back, and she must have been absent without his consent for the full period of one year before she became guilty of statutory desertion.

Now we are not satisfied from the evidence that, from July 21, 1909, when he left her, until in June, 1910, when the maintenance suit was first heard, he made any offer with the bona fide intention to bring about a reconciliation; at least we are not inclined to disturb the finding of the trial court in that respect. During this period of more than eleven months, he made but four offers, of which only two may be considered as such. The one said to have been embodied in the letter sent by registered mail must be disregarded because that letter is not preserved in the record and we have no means of judging of its value or effect as an offer. The one said to have been sent through Mr. Steele cannot be regarded as an offer because it was not transmitted to the defendant as such. Steele told her when he called that plaintiff had not sent him. This leaves but two—the one made in the presence of Mrs. Tucker and the one made in plaintiff's answer in the maintenance suit. When the first

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was made, the relations between the parties were necessarily strained. For several months they had lived jarringly together. He had then left her without warning. For three months his divorce suit had been pending and he had been vigorously endeavoring to obtain a dissolution of the marriage. That suit was still pending when he called. It was a delicate matter for these two to meet in an attempt to restore a broken home; not a matter for a third person to witness. The presence of a third person was not calculated to relieve the strain or to allow of the frank, free avowals, confessions and discussions so necessary to a successful reconciliation. Plaintiff must have known this, but nevertheless Mrs. Tucker was present, and there is some reason to believe that she was there by his connivance. Be that as it may, it was clearly divulged to him on this occasion that his wife believed that Mrs. Tucker was there by his prearrangement, and that she had considerable reason for so believing, Mrs. Tucker having called before her (Mrs. Tucker's) breakfast, avowedly to deliver a message from him coincidently with his first visit of ostensible conciliation. This visit was clearly timed most unfortunately, and, as he must have known, was more calculated to arouse suspicion and resentment in his wife than a spirit of conciliation. If he had been genuinely desirous to effect a reconciliation at this time, it seems that he would soon have followed this visit up with an offer made under more auspicious circumstances. He was silent for a month, when he registered a letter to her. This but tends to confirm the impression that he was trying merely to make evidence, not to effect a reconciliation. Thereafter he did nothing by way of communicating with his wife, except that he says he sent Steele to see her and except for his answer in her suit for separate maintenance. As to his sending Steele, it does not appear that he sent Steele to plead with his wife on his behalf or to make her any offer, but merely to

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"get her decision" in response to his offer made in the presence of the witness, Mrs. Tucker. Besides the fact that he sent Steele is established only by his own uncorroborated testimony, which is in the face of the fact Steele disclaimed to her being sent by him. Steele was not called on as a witness. We see no reason for disagreeing with the trial court's conclusion that the offer made in the presence of Mrs. Tucker was made with a view to its being rejected and not accepted; as a mere device to aid him in litigation, not with a bona fide intention to bring about a reconciliation.

The offer which he made in his answer in the maintenance suit is even more subject to objection. Presumptively it was addressed to the court and was intended primarily to defeat her action for separate maintenance. Necessarily it was not couched in terms of entreaty or persuasion, but was cold and formal, promising and asking nothing by way of forgiveness. It was accompanied by the charge that his previous suit for divorce was brought on account of "her acts and conduct," thus, by implication at least, repeating his prior accusations. It was calculated to embitter rather than to conciliate.

It is clear, then, that the defendant did not refuse a proper offer of reconciliation a year or more before this suit was brought and therefore was not guilty of desertion under the statute and the plaintiff is not entitled to a divorce.

Thus far we find ourselves able to agree with the learned trial court. We cannot agree that the defendant is entitled to a divorce as the court decreed. First, because we do not believe that under the evidence the efforts of her husband, after the first hearing in the maintenance suit, to effect a reconcilation, should be denounced as insincere; and second, because we are satisfied that subsequently to the original separation

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and within one year thereafter, she showed by her conduct that she acquiesced in the separation.

As to the first, we may say here that the fact that plaintiff had previously made insincere offers must be considered in weighing the integrity of his subsequent ones, but it does not conclude the matter. The "door of repentence and return" must have been kept open to him for a year, under the law. Now we find that, at the end of the first hearing in the maintenance suit, the trial judge (not the one before whom this case was tried) laid the matter over to give the parties a chance to become reconciled, the evidence no doubt suggesting to his mind the propriety and expediency of such a course. We find the plaintiff then resorting with a surprising, though commendable, persistency to all the known modes of effecting a reconciliation. The most that may be said against his sincerity in these subsequent attempts is that he kept copies of the three letters which he wrote. As to the offers contained in these it may be said that he wished to preserve evidence of them for use in the then-pending litigation. This was not conclusive that they were insincere, though it was a circumstance pointing in that direction. It well may be that he made the offers in good faith, intending to perform them if accepted, though at the same time desiring to place himself in the right in case she refused, by preserving evidence of his offers. The defendant was not advised that he kept copies, so his action in doing so could have had no effect on her, and was not calculated to influence her to reject them. The trouble with his previous offers had been, that they were made under circumstances not calculated to lead to their acceptance. Not so with those embodied in these letters. The letters are framed in the language of entreaty and persuasion, and, considered as offers of reconciliation, appear to be unexceptionable. To communicate with her by letter was not improper. Indeed, that method of communication

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is much to be commended, because it gave him an opportunity to express himself calmly and deliberately and gave her an opportunity to consider his offer, without the embarrassment and possibility of renewing the old quarrel, which might attend a personal visit. We are not inclined to view the offers contained in these letters as being insincere, and are fortified in that view by the evidence of the other offers which he made. His persistent following up of those letters with personal visits dispels any doubt in our minds of the sincerity of the offers they contained. The offer which plaintiff made through defendant's uncle was, it is true, made through a third person, who might be, and in fact was, used as a witness, but he was so friendly and close to defendant that it is improbable that plaintiff would have chosen him as a vehicle through which to convey a fraudulent and insincere offer of reconciliation. To communicate with her through her near and friendly relative was certainly unobjectionable and was calculated to conciliate. The other offers which plaintiff made personally are not subject to the objection that he preserved evidence of them. Defendant herself testified that on November 5, 1910, "he had been coming down there for months for me to go home with him,"—that is, since June. He had no witness on those occasions and did not try to have any. He made those offers privately and nothing is suggested which affects their sincerity. It is the same with the post cards, which, though not offers, tended in that direction. He kept no copies of them. As we have already intimated, the very number of offers which this plaintiff made after the first hearing in the maintenance suit impresses us with their sincerity. Plaintiff forcefully exclaimed in his examination in the maintenance suit, "Do you suppose I would have gone down after this woman as many times as I have and I talked to her the way I have and not take her back; would you have gone after anybody as many times as

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I have and her sit there and say, 'No, no,' every time; would you have gone back like I have if you wasn't sincere? No, you wouldn't, and no other man." This expresses our impression exactly. It is inconceivable that if he was then intending formal, insincere offers to take her back, the man would have so persisted, and would have resorted to so much repetition.

It is possible that the cause immediately moving plaintiff to endeavor to effect a reconciliation was the pendency of the suit for separate maintenance and the desire on his part to avoid a judgment coercing from him performance of the duty to support his wife. That does not diminish the legal effect of his offers to take his wife back, if he made them with the purpose of having her accept them if she would, and with intent, if she accepted, to take her back and treat her with kindness and respect and to perform his marital obligations. "No higher motives than those of convenience, it unfortunately must be allowed, have both induced and preserved multitudes of matrimonial unions." [McMullin v. McMullin, 123 Calif. 653, 656.] In this case, as we have already indicated, we are satisfied that his offers were sincere, at least in the sense just mentioned, though by no means do we believe that that was the only sense in which he was sincere.

As to the alleged incident of November 5, 1910, when she says she offered to go back to him and he refused, nothing but a fragment of it is disclosed, if we observe the rule by which the case was tried. It is improper to consider that mere fragment without the explanatory matter which preceded, or to consider the explanatory matter now, when the parties treated it as inadmissible at the trial. However, if we consider her version of the whole incident, what does it amount to? Almost on the eve of the resumption of the trial of the maintenance suit, at 9:30 o'clock at night, after refusing for months to go back to him,

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she suddenly offers to do so. After expressing some curiosity at her sudden change of front, but willingness to receive her, he asks if she will promise to clear the record of the maintenance suit—that suit in which they had already undergone one long, hotly-contested trial and were immediately threatened with another; in which her attorneys had a motion then pending for $750 attorneys' fees additional to the $150 they had already received, and she was demanding an allowance for separate maintenance. She refused to promise to dismiss the suit and he refused to take her back until she would promise to do so. She now claims that she "owed the man no promise." We are of the opinion that she did. By her constant refusals to go back to him she had by this time put herself in the attitude of the wrongful absentee, and it was incumbent upon her now to make a proper and sincere offer, and an offer coupled with a refusal to abandon the litigation and to live in peace with him was not sufficient. [Jenkins v. Jenkins, 104 Ill. 134.] And plaintiff's many previous offers to take her back are not to be stamped with insincerity because, when she finally consented, he insisted that she dismiss the litigation and live with him in peace. It was not improper that he should wish to get at least her promise to abandon the litigation against him before undertaking the difficult matter of taking up their lives together again. Offering peace, he was entitled to a promise of peace, and she is mistaken when she says that "she owed the man no promise." It is to be noted that he did not purpose to delay her coming back until the suit was dismissed, but was willing that she should come back then, though it was late at night, upon her mere promise to later abandon the litigation.

It appearing, then, that this husband repented and made a genuine offer to return and renew cohabitation before the statutory period of desertion was complete, this was sufficient to break the desertion and

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is a bar to the wife's suit. Defendant here suggests that, at the trial of the maintenance suit, the husband refused to tell his wife's counsel what he would do in the matter of taking his wife back, saying in substance "that is a question for the future." We passed on that feature of the case in the maintenance suit, resolving that such answer on the part of the husband was more probably due to the fact that he had become aggravated and wroth at plaintiff's counsel and resented the manner of his cross-examination, rather than to a real indisposition to resume his marital relations, especially in view of his testimony as to his endeavors to make up with his wife and his declarations in the prior part of his testimony. [Creasey v. Creasey, 168 Mo. App. 98, 151 S. W. 215. We see no reason for departing from the conclusion then formed. In fact, we are strengthened in it by the showing here, that immediately after the maintenance suit was finally determined in the husband's favor, he thrice attempted to resume negotiations with his wife. As to her alleged offers contained in the motions for attorneys' fees, filed in the maintenance suit, they were not made as offers, but as excuses for demanding money, and were calculated to irritate, without disclosing any conciliatory tendency. They should be disregarded. In saying this we do not mean to reflect upon the merits of those demands nor to impugn the motives of the plaintiff or her attorneys in making them.

The second reason which we have given for denying defendant a divorce is, that subsequently to the original separation and within one year thereafter, she showed by her conduct that she acquiesced in the separation. Although the husband's leaving was wrongful in the first instance, it did not constitute desertion within the meaning of this statute, if the wife by her subsequent words or conduct acquiesced in the separation. [1 Nelson on Divorce & Separation, sec. 91; Davis v. Davis, 60 Mo. App. 545; Droege v. Droege,

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55 Mo. App. 481, 486.] On the occasion of her husband's first offer in the presence of Mrs. Tucker, we find defendant coldly inquiring what he will give her to come back and greeting with a scornful, "Oh, is that all?"—his reference to himself. She further told him on that occasion and in the same connection, that should she come back to him he would have to meet conditions "you don't think you will have to meet." In her answer in the maintenance suit, she is not content with refusing his offer on the ground of insincerity but goes further and says in response to it that "there is such an incompatibility in the temperament, disposition and purpose in life between the plaintiff and defendant that a renewal of the marriage relationship would result in a repetition of the same or similar indignities stated in the plaintiff's (her) petition." It thus appears that, while he was insincere in these two offers of reconciliation and may be taken to have desired the separation to continue, she too desired it to continue. Where the separation is acquiesced in by both, neither is entitled to a divorce on account of it. When her uncle came avowedly from her husband with a request for her to return, she answered that "not yet, she couldn't." He asked her why and she said, "you don't know all, he has even had men to watch my house." Her letter to him disclosed the same inclination to bring up, and dwell on, his conduct before the separation as a reason for not going back to him. If we take her at her own word, it is clear that she was unwilling to go back to him because of his conduct before the separation. As that conduct was not sufficient to constitute cause for divorce, she could not, by remaining away in consequence thereof, "create for herself a cause for divorce, upon the theory that, by so electing to remain away from her husband, he incurs the guilt of deserting her. If the indignities themselves are not a sufficient cause for di-

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vorce, a new cause for divorce cannot be extracted from them by the voluntary conduct of the party seeking the divorce." [Dwyer v. Dwyer, 16 Mo. App. 422.] Her subsequent failure to go back, in the face of his personal appeals to her to do so, but emphasizes what had already been disclosed, that she was at least as eager to remain away from him as he was to remain away from her. She may have refused his first offers because she did not believe him sincere, but clearly that was not the only reason. The other reason, we are convinced, is that she did not desire to go back.

The judgment of the circuit court is reversed and the cause remanded with directions to the circuit court to enter its judgment that the plaintiff take nothing by his petition and that the defendant take nothing by her answer; the defendant, however, to have and recover her costs in this behalf expended. The matter of an allowance to defendant for attorneys' fees for services here and in the circuit court, we leave to the circuit court. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

CARRIE B. CREASEY, Appellant, v. MASON M. CREASY, Respondent.

St. Louis Court of Appeals, November 12, 1912.

1. **MAINTENANCE: Defenses: Offer to Effect Reconciliation.** In view of Sec. 8295, R. S. 1909, providing for support and separate maintenance for a wife, that the allowance shall be for such time as the nature of the case shall require, and that the court shall from time to time make further orders as shall be just, a sincere offer of a husband, who had abandoned his wife and failed to support her, to take her back and maintain her with conjugal kindness and affection, even after a decree for separate maintenance, will defeat her right to separate maintenance.

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2. ———: ———: ———: **Form of Judgment.** A judgment for separate maintenance in favor of a wife, whose husband has abandoned and failed to support her, should be so framed as to allow maintenance only until such time as the husband shall take her back and treat her with conjugal kindness and affection.

3. ———: **Taking Case Under Advisement: Trial Practice.** In an action by a wife for separate maintenance, it is not error for the trial court to take the case under advisement and postpone its decision to a later date in order to give the parties an opportunity to become reconciled.

4. **APPELLATE PRACTICE: Review: Action for Maintenance: Taking Case Under Advisement: Necessity of Exception.** In a suit by a wife for separate maintenance, the action of the trial court in taking the case under advisement and postponing its decision to a later date to give the parties an opportunity to become reconciled, cannot be reviewed, on appeal, in the absence of an exception to such action.

5. **TRIAL PRACTICE: Reopening Case: Discretion of Court.** It is a matter of discretion with the trial court to admit or exclude testimony after a case has once been closed, and such discretion will not be interfered with on appeal, except in case of its manifest abuse.

6. **MAINTENANCE: Trial Practice: Reopening Case.** In an action by a wife for separate maintenance, the trial court has the discretionary power of reopening the case and hearing additional evidence on the husband's attempts to effect a reconciliation, after the case had been taken under advisement.

7. ———: **Defenses: Offer to Effect Reconciliation: Sufficiency of Evidence.** In an action by a wife for separate maintenance, evidence *held* to support a finding that defendant offered in good faith to take plaintiff back and maintain her with conjugal kindness and affection, and hence it is *held* that a judgment for defendant was proper.

8. ———: **Res Adjudicata: Conclusiveness of Judgment.** A judgment for defendant, in an action by a wife for separate maintenance, on the ground that he had offered in good faith to take her back and maintain her with conjugal kindness and affection, would not be a bar to a future action for maintenance by the wife, if, upon a resumption of the marital relations, he should mistreat her, or, upon an attempt to return to him in accordance with his offer, he should repulse her.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett,* Judge.

AFFIRMED.

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D. A. Murphy and *Clarence A. Barnes,* for appellant.

(1) The only issues of fact that can be raised or tried are whether the husband without good cause has abandoned his wife and neglected or refused to support her. Sharpe v. Sharpe, 134 Mo. App. 278; Youngs v. Youngs, 78 Mo. App. 225; McGrady v. McGrady, 48 Mo. App. 668. The time at which the above facts should appear is of the date of the institution of the suit. Polster v. Polster, 145 Mo. App. 606; State v. Weise, 156 Mo. App. 135. (2) Plaintiff, as the injured and innocent party, had the right to determine whether or not she would avail herself of the cause for divorce, which the defendant had hurled at her, and secure a divorce, or whether she would live separate and apart from her husband, maintained and supported by him; and whatever offers were made after that and especially when made under the strong intimation of the court and after the court had found against the plaintiff, and after the case had been in the bosom of the court for four months and continued for sixty days longer to afford the defendant an opportunity to become reconciled, or rather to afford the defendant an opportunity of making a prima facie case of his own good faith, was never contemplated by the statute, was not within the pleadings, and more particularly is this true in the light of the fact that the record is absolutely silent of any promise of better treatment from the husband to the wife. Spengler v. Spengler, 38 Mo. App. 266. (3) Under all the evidence and the record in this case the trial court's finding that the defendant endeavored in good faith to become reconciled to his wife and thereby defeat the plaintiff's cause of action to what was otherwise a most meritorious case, constituted another of the grievous errors which is properly presented on appeal, and while the appellate courts will in a measure defer to the finding of the

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trial court on questions of fact, yet such finding is not conclusive, and the appellate court will review the entire record and reject incompetent evidence admitted on the part of the defendant, and where the offers sufficiently show admit the offers of competent evidence on the part of the plaintiff, and to make its own findings and return a judgment accordingly. Goodrich v. Harrison, 130 Mo. 263; Davis v. Klein, 96 Mo. 401; Barrett v. Davis, 104 Mo. 547; Sheridan v. Nation, 159 Mo. 401.

L. P. Crigler and *Barclay, Fauntleroy & Cullen* for respondent.

(1) The action instituted by the plaintiff cannot be maintained because her refusal to return and live with her husband constitutes consent on her part to the respondent living separate and apart from her. Youngs v. Youngs, 78 Mo. App. 225; Droege v. Droege, 52 Mo. App. 84. (2) When a wife remains away from the husband without his consent, and upon his request made in good faith refuses to return to him and discharge the duties of wife, she is not entitled to a judgment for maintenance. Schuman v. Schuman, 93 Mo. App. 104; Louis v. Louis, 134 Mo. App. 566; Thomas v. Thomas, 152 Ill. 577; Hair v. Hair, 10 Rich. Eq. 163; McMullin v. McMullin, 123 Cal. 653; Schroeder v. Schroeder, 26 Ill. App. 524; Kenley v. Kenley, 3 Miss. (2 How.) 751; Briggs v. Briggs, 24 S. C. 377; Crow v. Crow, 23 Ala. 583; Jerolaman v. Jerolaman, 54 Atl. (N. J. Eq.) 166; Hanberry v. Hanberry, 29 Ala. 719; Fellows v. Fellows, 31 Mo. 342; Hooper v. Hooper, 24 N. J. Eq. 93; Whelan v. Whelan, 183 Pa. 293; McGowan v. McGowan, 50 S. W. 399; Gilbert v. Gilbert, 5 Misc. Rep. 555, 26 N. Y. Supp. 30; Chipchase v. Chipchase, 48 N. J. Eq. 549; Provost v. Provost, 63 Atl. (N. J. Eq.) 619.

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STATEMENT.—Suit for maintenance brought by the wife against the husband under the provisions of section 8295, Revised Statutes, 1909. The defendant husband had judgment and the plaintiff has appealed.

The petition alleged that defendant, without good cause, abandoned his wife and refused and neglected to provide for her, other than to permit her to occupy one of his tenement houses. The answer admits the marriage and contains a general denial; also a plea, in substance, that defendant had offered to receive his wife again into his home and to afford her suitable maintenance, and was willing and able to do so, and that such offer, willingness and ability continued up to the time of filing the answer. The reply alleged that the offer was not made in good faith and that defendant was not willing, etc.

The trial began on June 14, 1910, and the hearing occupied that and the next day. The parties then announced that they rested, whereupon the court gave some declarations of law as offered by the plaintiff, modified some and gave them as modified, and refused others. It then laid the case over "to give the parties an opportunity to become reconciled." On November 9, 1910, the matter was called again for hearing, both the parties and their attorneys being present, and the court offered to give each party an opportunity to offer further evidence as to anything which might have happened in the interim. The defendant then offered testimony as to what had occurred in the way of endeavors on his part to effect a reconciliation with his wife. The plaintiff offered no testimony and refused to offer any, contenting herself with a mere formal statement by counsel in open court that her husband's endeavors were not in earnest; that some six weeks before she had asked the court to allow the costs and stated as a ground for the motion that she willingly forgave the defendant and promised to live with him as his wife; that the motion still remained undisposed

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of and no effort had been made to call it up; that "we do now consent to return and live with him." Counsel for plaintiff stated that he "offered no testimony at all, on the theory that all this testimony has been improper." Thereupon the court rendered its decision and caused judgment to be entered, wherein it finds on the entire evidence that though defendant originally abandoned plaintiff without cause and continued in fault until he endeavored in good faith to become reconciled to his wife and to provide for her, he has since the September term, 1910 "been in good faith endeavoring to be reconciled to his wife and to have her live with him and to make ample provision for her," and "finding no good reason for the parties to longer live separate and apart," the court dismissed the cause at defendant's cost.

The testimony upon which these findings were based occupies 522 pages of the printed record. It is not practicable to set forth within the necessarily narrow confines of a judicial opinion even a full synopsis of such a mass of testimony. The only question raised here which calls for a reference to the testimony is whether the defendant's offer to take his wife back was made in good faith. With that question in mind, we have carefully reviewed the entire testimony, and base our decision of the question last mentioned on that. However, the following statement is, we believe, a fair indication of the general purport or trend of the testimony:

Plaintiff and defendant were married in Mexico, Missouri, April 17, 1907. Both had been residents there for twenty-five or thirty years. Each had been married before. She had a minor son by her former marriage; he had three minor children by his. He was forty-six years of age at the time of the trial, was engaged in the second-hand furniture business, and had property worth some $20,000, and an income of about $175 per month. He was a sober, industrious

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man, and both were of excellent moral character. Upon their marriage they, with their respective children, took up their abode in a commodious, well-furnished and desirably-situated residence, which was owned by the defendant. Plaintiff's aged father also soon made his home there, paying no board, though there is some evidence that he did work for defendant to pay for his keep.

For over a year and a half—that is, until about January 1, 1909—happiness reigned supreme in the home, and kindness and respect characterized the conduct of its inmates toward each other. Just what caused an entire change after that date is not disclosed, but thereafter the parties became cold and indifferent and avoided and repulsed each other. He was discourteous, professed not to love her and reproved her in the presence of his children, and she was not without fault. Nothing, however, occurred between the parties which formed any insuperable obstacle to their thereafter becoming reconciled. Affairs culminated in defendant moving plaintiff into another and smaller house owned by him, and then leaving her and filing suit for divorce, charging that she had offered such indignities to him as to render his condition intolerable. He filed the divorce suit on July 21, 1909, the day he left her. He left her no money and little provisions, and after a while ordered the merchants of the town to sell her nothing on his credit. He contributed nothing to purchase food and clothing for her until February 7, 1910, when the court, in this suit for maintenance, made her a temporary allowance of $100 for immediate personal needs, $150 for her attorneys' fees and forty dollars per month thereafter. Until then she subsisted on money she earned, clerking in a department store, and on such credit as she could obtain on her own account, occupying, however, the house he had placed her in, rent free.

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On September 29, 1909, while his divorce suit was pending, the defendant herein called upon plaintiff. A Mrs. Tucker was making a call on plaintiff at the time. Thereupon, in the presence of Mrs. Tucker he asked his wife to come back to him. It is needless to describe that offer or incident here. It is described and discussed in another suit between the parties, the opinion in which is handed down with this one. [Creasey v. Creasey, 168 Mo. App. 68, 151 S. W. 219.] It is the same with other offers alleged to have been made up to the time of the first hearing of this suit. It may be accepted that defendant made no sincere offer to return to his wife or to take her back until at least after such first hearing. The divorce suit was dismissed on September 29, 1909, the day defendant first called on his wife after the separation, as aforesaid.

At the first hearing in this suit defendant professed to love his wife, and expressed a desire and willingness to have her come back. On her part, she denied that she had gotten into a temper of mind that she did not love her husband and said that she loved him all the time. She would not say whether she loved him at the time of the trial. She admits that she had done nothing towards resuming her marital relations. Being asked whether she would live with her husband, she was not permitted to answer because of the objection of her counsel.

The evidence on the second hearing tends to prove that after the first hearing—that is, after the court had laid the case over to give the parties a chance to become reconciled—the defendant called on plaintiff three times, trying to induce her to return to him and met with refusals. Then he went to Texas on a visit and while there wrote two letters to her. They are profuse with protestations of love and entreaties to her to come back to him and contain promises to forgive and requests to be forgiven. It does not appear that she answered any but the first letter. In such

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answer, under date of July 13, 1909, she told him that it seemed too true that he had already forgotten the way he had "imposed" on her, and suggests that he had written at some other person's suggestion and dictation and not with his own words. She insinuates that he is writing pursuant to a "lesson" in accordance with a "plan." She states that her heart is broken; that she feels entitled to his love and would give the world for it, but that her intuition tells her that it would never do, for he had long since made up his mind to discard and humiliate her. Her letter ends with "I must close for I tremble so as I write this, and I do not want to say anything to discourage either of us in an honest effort to forget our differences." When defendant returned, he called on plaintiff and asked her if, after studying the matter over, she was ready to come back, stating that he was willing to drop all past trouble, and wanted her to do the same. He testified that he made this call upon his wife because he loved her. He repeated these visits twelve to fifteen times, asking her every time to come and live with him. She refused, saying that he was trying to set a trap to catch her in and insisting that he deed her the house on South Jefferson street if she went back, and that he would have to go to her lawyers and settle with them. On October 16, 1910, he wrote to her again in the language of love and persuasion, asking her to come back or to let him come back, promising to treat her right, etc. He asks for one more interview, intimating that he was getting discouraged and would have to give up unless she would consent this time. All the letters mentioned herein are set forth in full in the case before mentioned between the same parties. Finally, she told him that she was "going to let the court pass on it."

During the cross-examination of defendant, plaintiff's attorney asked him whether, if he was required to pay the attorneys' fee, he would pay it rather than

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be living apart and separate from his wife, and he answered, "certainly." The attorney then asked him why he did not take her back, and he answered, "She wouldn't go." Thereupon defendant's attorney challenged plaintiff's attorney to dismiss this suit for maintenance promising that defendant would take his wife back if it was done. Defendant interjected at this point, evidently addressing plaintiff's counsel, "Do you suppose I would have gone down after this woman as many times as I have and talked to her the way I have and not take her back; would you have gone after anybody as many times as I have and her sit there and say 'No, no,' every time; would you have gone back like I have if you wasn't sincere? No, you wouldn't, and no other man." Plaintiff's counsel merely answered, "We will see," and went on with his cross-examination. After this cross-examination had become rather acrimonious, impugning defendant's motives and disclosing or developing considerable antagonism between him and the examining counsel, without, we must say, having any tendency to encourage a desire or display of desire on defendant's part for reconciliation, the defendant refused to tell plaintiff's counsel whether he would take his wife back, saying that though he had not given up hope of getting her back and had always wanted her to come back, he would let the court decide the matter, she having told him repeatedly that the court must decide it; that he would not say what he would do after the court had decided the matter, would not say that he would or would not take her back; would not answer the question; would go to her and say what he wanted to say to her regardless of what her counsel did or said.

It seems that plaintiff's attorneys filed herein a motion for an allowance of additional attorneys' fees, 'and for grounds thereof says that she willingly forgives the defendant for those unhappy differences which impelled her maintenance of the present suit,

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and purposes to faithfully discharge all of her duties as the wife of defendant." Defendant testifies that, after this motion was filed, he met his wife and asked her if she meant what was said in it, and she said she did. He told her the court had already allowed her attorneys $150. She said he ought not to pay it again if that was the case. He proposed then that they go right away to the court house and dismiss this proceeding. She said, "No sir, I am going to let the court pass on it."

As we have already mentioned, the plaintiff refused to offer any evidence on the second hearing.

CAULFIELD, J. (after stating the facts).—Plaintiff's counsel advances the theory that the only issues of fact that could be raised or tried were whether the husband, without good cause, abandoned his wife and neglected or refused to support her, and that therefore it was error for the court to consider the question whether the defendant was able and willing to resume his duty of making proper provision for his wife and to become reconciled to her and honestly endeavored to do so. Carrying this theory to its logical conclusion, plaintiff's counsel contends in his brief that an abandonment and failure to provide for the wife having been shown to have existed, "the only thing remaining was for the plaintiff to determine upon what length of time she desired a separate maintenance and support to be awarded, and if substantial evidence was adduced supporting her prayer, it then became the duty of the court to award it for such period of time, so that, when the plaintiff in the case at bar requested an allowance for the remainder of her natural life and predicated her prayer upon the proposition that the defendant had given plaintiff cause for divorce, a decree in accordance with her prayer was the only allowance the court could make." Such theory and the contention based on it are with-

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out merit or precedent to sustain them. The courts of various states differ as to whether they have power, without statutory authority, to make and enforce an allowance for separate maintenance except as incident to a divorce proceeding, but there does not seem to be any question that a sincere offer on the husband's part to take back and maintain the wife and treat her with conjugal kindness and affection will generally defeat her right to a separate allowance. [21 Cyc. 1602; Kenley v. Kenley, 2 Howard (Miss.), 751; Hair v. Hair, 10 Richardson's Equity Reports, (S. C.) 163; Schraeder v. Schraeder, 26 Ill. App. 524; McMullin v. McMullin, 123 Calif. 653; Skittletharpe v. Skittletharpe, 130 N. C. 72.] The wife gets no vested right to separate maintenance because her husband has abandoned and refused to provide for her. Such right ceases if he does not persist in such wrongful conduct and sincerely offers to resume his marital relations and obligations. [Schraeder v. Schraeder, supra.] Nor is the husband's offer to deal rightly by his wife any the less effective to defeat his wife's right to separate maintenance because made after being sued for separate maintenance or even after a judgment in such suit, though of course the lateness of his repentance might be considered in adjudging the question of his sincerity. [Schraeder v. Schraeder, supra.] In fact, the judgment should be so framed as to anticipate that contingency and allow only for a separate support to the wife until he will take her back and treat her with conjugal kindness and affection; and such are the usual terms of such judgments. [1 Bishop on Marriage, Divorce and Separation, sec. 1417.] If he should sincerely become willing and offer to do that, the necessity for separate maintenance would cease. [Skittletharpe v. Skittletharpe, supra.] If the judgment was otherwise drawn, it would still be the duty of the court to refuse to enforce it, if it appeared that the parties had come

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together again, or that the husband was willing to assume his marital relations and obligations and was prevented only by his wife's refusal from doing so. [Reid v. Robinson, 9 Lower Can. Jurist, 103.] Our statute is in harmony with the foregoing ideas, for it provides that the support and maintenance shall be "for such time as the nature of the case and the circumstances of the parties shall require," and that the court shall "from time to time make such further orders touching the same as shall be just." [Sec. 8295, R. S. 1909.]

Applying these principles to the facts of the case at bar it is evident that the trial court did not err in denying plaintiff a judgment for separate maintenance, it being satisfied by substantial evidence that defendant was willing and had repeatedly offered to resume his marital relations and obligations, and was prevented from doing so only by the refusal of his wife.

It was not error for the court to take the case under advisement and postpone its decision to a later day, and, if it had been, plaintiff did not preserve the point by excepting to such action. [Kuhl v. Kuhl, 160 Mo. App. 363, 140 S. W. 949.] Plaintiff did not suffer because of the postponement, for in the meantime she was enjoying an allowance for temporary maintenance.

Neither did the trial court err in reopening the case and hearing additional testimony bearing on defendant's attempts, after the first hearing, to effect a reconciliation with his wife. It is a matter of discretion with the trial court to admit or exclude testimony after a case has once been closed and such discretion will not be interfered with except in case of its manifest abuse. [Kuhl v. Kuhl, supra.] And in a suit like this for separate maintenance, where, as we have seen, the judgment, if for plaintiff, would not be a final one, in the sense that term is usually

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used, but would only be for separate maintenance until the husband was sincerely willing to resume his marital relations and obligations, and would not preclude him from afterwards seeking to effect a reconciliation, evidence of the husband's present attitude would be clearly pertinent to the matter before the court, for it would be idle to enter such a judgment if the husband was then willing to do his duty and, therefore, separate maintenance was not necessary.

Likewise it was not error for the trial court to modify the declaration of law offered by the plaintiff, which declared that if defendant abandoned plaintiff without cause, she was entitled to a separate maintenance, by adding thereto, "until defendant resumes his duties of making proper provision for his wife and becomes reconciled to her or honestly endeavors so to do." Such addition was in entire harmony with the law as above mentioned.

Plaintiff further contends that the finding that the defendant's offer to take her back was made in good faith is not supported by any evidence in the case. It is clear that there is no foundation for this contention. The evidence tending to support such finding was ample and was substantially, if not entirely, uncontradicted, as will be seen from our statement of the facts. The plaintiff, though given an opportunity, refused to offer any testimony on that subject.

Nor are we inclined to disturb the judgment because the husband finally refused to tell counsel for plaintiff what he would do in the matter of taking his wife back. It is fair to infer that by that time, that is, at that point in his cross-examination, he had become aggravated and wroth at plaintiff's counsel and resented the manner of his cross-examination, and such refusal could more readily be attributed to mere temporary spleen directed at plaintiff's counsel than to a real disposition not to resume his marital relations.

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Especially is this so when his testimony as to his endeavors to make up with his wife and his declarations in the prior part of his testimony are considered.

We may add to the foregoing that if the plaintiff returns to her husband and he should illtreat her to such an extent as to justify her living apart from him, or if, upon an unequivocal attempt to return to him, he shall repulse her or refuse to cohabit with her as her husband, the decree in this case will not bar her remedy against him. [Schraeder v. Schraeder, 26 Ill. App. 524, 525.]

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

J. M. BYRD, Respondent, v. W. F. VANDERBURGH, Defendant; BANK OF MARSTON, Interpleader Appellant.

St. Louis Court of Appeals, November 12, 1912.

1. **APPELLATE PRACTICE: Reviewing Matters of Exception: Necessity of Motion for New Trial.** Where the appellant does not assign error on the record proper, the appellate court will review only those matters that have been finally passed upon by the trial court on the motion for a new trial.

2. **———: New Trial: Grounds of Motion: Verdict Against Weight of Evidence.** A ground of a motion for a new trial, that "the verdict and judgment are for the wrong party," and a ground that "the verdict and judgment are contrary to the evidence," are, in substance, the same as a claim that "the verdict and judgment are contrary to the greater weight of the evidence," which is not a ground of appellate interference.

3. **———: Conclusiveness of Verdict.** The appellate court will not disturb a judgment of the trial court on the ground that the verdict returned was contrary to the greater weight of the evidence.

4. **———: New Trial: Grounds of Motion: Sufficiency.** A ground in a motion for new trial, that the judgment and verdict are against the law, is not sufficiently specific for consideration.

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5. ———: **Sustaining Demurrer to Evidence: Harmless Error.** The error in sustaining a demurrer to plaintiff's evidence as to a part of the property involved in an attachment suit was made harmless by the rendition of judgment for plaintiff as to such part of the property.

6. ———: **Reviewing Admission of Evidence: Necessity of Exception.** The admissibility of evidence will not be considered, on appeal, where no exception was saved to the ruling admitting it.

7. ———: **Excluding Evidence: Harmless Error.** The error in excluding evidence relating to an item of property in controversy as to which judgment was rendered for appellant, was harmless.

8. **NEW TRIAL: Perjury or Mistake: Discretion of Court.** Sec. 2022, R. S. 1909, authorizing the granting of a new trial if the court is satisfied that perjury or mistake was committed by a witness, occasioning an improper verdict or finding as to such matter, and that the moving party has a just cause of action or defense, gives the trial judge a wide discretion in granting a new trial on such ground, subject only to its reasonable exercise under the facts.

9. **APPELLATE PRACTICE: Conclusiveness of Findings of Fact.** It is not the appellate court's province to interfere with findings by the trial court which depend upon the credibility of witnesses.

10. **NEW TRIAL: Surprise: Trial Practice.** It is a general rule that each party must understand his case and come prepared to meet the case made by his adversary, and a party cannot, therefore, be surprised that his adversary introduced testimony in support of the issues made by the pleadings, even though such testimony was false; and hence, in attachment proceedings involving the right to possession of hoops, where the only issue was whether interpleader, who purchased the hoops from the debtor, had taken actual possession thereof, and interpleader, in order to establish that it had taken possession, introduced evidence that it had marked the hoops, interpleader was not entitled to a new trial on the ground that it was surprised because plaintiff's witnesses testified that the hoops were not marked when the attachment levy was made, although the fact that they were so marked was not denied at the trial in the justice's court, where the case originated.

11. ———: ———: ———: **Appellate Practice.** If a party is surprised by an unforeseen occurrence at the trial, such as the admission of evidence, he should immediately apprise the

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court of his surprise and ask for a reasonable postponement to enable him to produce counter evidence; and if he fail to do this, he is in no position to urge his surprise as ground for a new trial.

12. ATTACHMENT: Fraudulent Conveyances: Possession: Burden of Proof. In attachment proceedings involving the right to possession of chattels claimed by an interpleader as purchaser from the debtor, the burden is on the interpleader to show that he took actual possession upon purchasing, as required by law.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Peter Huck,* Judge.

AFFIRMED.

E. F. Sharp for appellant.

A new trial should have been granted interpleader herein by the court on the ground that perjury or mistake had been committed by witnesses of plaintiff in regard to when the hoops were marked. The affidavits filed with the motion for new trial show conclusively that their testimony was in error in this important respect. Interpleader was over 120 miles away from home and from where the witness who made affidavits live. It was an abuse of judicial discretion not to allow it. Sec. 2022, R. S. 1909; Ridge v. Johnson, 129 Mo. App. 541; Rickard v. Martin, 43 Mo. App. 597.

Brown & Gallivan for respondent.

Courts will not grant a new trial where the evidence for which same is requested would be merely cumulative. State v. Allen, 171 Mo. 562; State v. Bybee, 149 Mo. 632.

STATEMENT.—The controversy here is between the plaintiff, Byrd, an attaching creditor of defendant Vanderburgh, and the Bank of Marston, interpleader

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in the attachment suit, and involves the right to the possession of a quantity of hoops piled in the hoop sheds of the Marston Hoop Mill at Marston, Missouri. The issues made upon the bank's interplea were tried to the court, jury being waived, and were found in favor of the plaintiff, the attaching creditor, as to all the hoops except some, which, when attached, had been loaded into a railroad car for shipment. The bank, interpleader, has appealed to this court.

It claimed the right to the possession of the hoops under and by virtue of an instrument in the form of a bill of sale to it, which was executed by defendant Vanderburgh on February 11, 1909, to secure certain advancements made and to be made by the bank, and purporting to transfer to the bank all hoops then in said sheds and all that might thereafter be manufactured by said mill or piled in said sheds or thereabout. It is conceded that neither the said instrument nor a true copy thereof was recorded or filed in the recorder's office. Up to Saturday, May 15, 1909, all the hoops remained in the hoop sheds where they had been placed and kept by Vanderburgh while concededly in his possession. Part of them had been manufactured before the "bill of sale" was executed and part thereafter. The bank does not appear to have had possession or control of the sheds. They were appurtenant to the hoop mill which defendant Vanderburgh operated.

On Saturday, May 15, 1909, the bank caused part of the hoops to be loaded on a car for shipment to a buyer whom Vanderburgh had found, he says, for the bank. The buyer's order for the car of hoops was addressed to the bank. A bill of lading issued in the name of the buyer. This loading was done by one Nelson, Vanderburgh's foreman, who was, however, according to the bank's evidence, employed by the bank for such loading. The hoops not so loaded remained in the sheds. On Monday, May 17, 1909, the

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hoops in the sheds as well as those on the car were levied on under the writ of attachment. The sole question upon the trial was whether the bank had taken possession of the hoops in the manner required by statute, before the attachment was levied.

The cashier of the bank testified on its behalf that, several weeks before the attachment, the bank caused the hoops to be marked "here and there all over the several piles, 'Property of the Bank of Marston;' " that the words "Bank of Marston" were put on with a rubber stamp and the words "Property of" written with a lead pencil just above them. Ankersheil, assistant cashier, testified that he marked the hoops for the bank; that, in addition to the rubber stamp and lead pencil marking, he had written on sheets of paper the words, "Property of the Bank of Marston," and attached one or more of such sheets on each pile of hoops in the shed. On the other hand, W. A. Nelson, who had charge of the loading of the car for the bank, and J. D. Dockery, the constable who levied on the hoops, gave testimony on behalf of plaintiff, the attaching creditor, to the effect that the hoops were not marked by the bank until after the levy of the attachment. Dockery denied having testified before the justice of the peace that when he went to the shed he found the notices on the hoops.

The grounds stated in the bank's motion for a new trial are as follows:

"1st. Because the verdict and judgment is for the wrong party.

"2nd. Because the verdict and the judgment are contrary to the greater weight of the evidence.

"3rd. Because the verdict and judgment is contrary to the law and the evidence.

"4th. Because the court erred in sustaining in part the motion of the plaintiff, J. M. Byrd, in the nature of a demurrer as offered at the conclusion of the testimony of interpleader.

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"5th. Because the court erred in sustaining the motion of plaintiff Byrd offered at the conclusion of all the testimony.

"6th. Because the court erred in admitting incompetent and irrelevant testimony offered by plaintiff over the objection of interpleader.

"7th. Because the court erred in refusing to admit competent, material and relevant testimony offered by interpleader.

"8th. Because witnesses for the plaintiff committed either perjury or mistake in testifying that the hoops involved in the suit were not marked by the interpleader prior to the levy of the attachment, as see affidavits filed herewith.

"9th. Because interpleader was surprised by the testimony offered by plaintiff to the effect that the said hoops were not marked when levy was made, as this fact was not denied at the hearing before the justice of the peace. Affidavits proving the contrary to be the fact are filed herewith."

Accompanying this motion were six affidavits, which, if accepted as absolutely true, would establish that the marking occurred prior to the levy of the attachment, and tended to prove that the plaintiff's witnesses, Nelson and Dockery, knew that such marking had been done. The affiants, however, do not agree with the bank's witnesses at the trial as to when such marking was done. None deposed that it was done more than two weeks before the attachment levy, and one deposed positively that only "several days" before the hoops were loaded into the car he saw Ankersheil doing the marking.

CAULFIELD, J. (after stating the facts).—As the appellant, interpleader, does not claim that there is any error on the face of the record proper, we may only consider what has been finally passed upon by the circuit court on the motion for a new trial.

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The first ground stated in said motion is, that "the verdict and judgment are for the wrong party." This, and that embodied in the third ground, viz.: that the verdict and judgment are contrary to the evidence, are merely the statement in another form of the second ground, which is, that "the verdict and the judgment are contrary to the greater weight of the evidence." [State ex rel. Stewart v. Todd, 92 Mo. App. 1. See, also, Heine v. Morrison, 13 Mo. App. 577; State v. Scott, 214 Mo. 257, 113 S. W. 1069.] That is not a ground on which we may interfere with the judgment of the trial court.

The statement in the third ground, that the verdict and judgment are against the law, is not sufficiently specific to compel consideration. [State v. Scott, supra.]

The fourth ground relates to the action of the trial court in sustaining a demurrer to the evidence of the interpleader (appellant) as to the hoops loaded on the car. This action was taken at the conclusion of the testimony of the interpleader. But the judgment should not be reversed because of such action, for the reason that it was for the interpleader as to those hoops, and whatever error was involved in sustaining the demurrer was thereby rendered harmless.

The fifth ground is, that the court erred in sustaining the motion of plaintiff offered at the conclusion of all the testimony. The record does not disclose that any such motion was sustained or offered.

The sixth ground, that the court erred in admitting incompetent and irrelevant testimony offered by defendant over the objection of the interpleader, must be overruled because the record does not disclose that the interpleader saved any exception to any ruling on the admissibility of evidence offered by the plaintiff.

The seventh ground is, that the court erred in refusing to admit competent, material and relevant

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testimony offered by the interpleader. The only evidence offered by the interpleader which appears to have been excluded and exception noted, was the bill of lading for the carload of hoops. As this evidence related only to the hoops in the car, and the judgment of the trial court was in favor of the interpleader as to them, the error in excluding it, if any, must be held to have been harmless.

This brings us to the eighth and ninth grounds stated, which are the principal grounds relied upon by appellant in urging that the judgment be reversed and a new trial granted. The eighth is, that "witnesses for the plaintiff committed either perjury or mistake in testifying that the hoops involved in the suit were not marked by the interpleader prior to the levy of the attachment." The statute (Sec. 2022, R. S. 1909) provides that the trial court shall grant a new trial if it "is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action or defense." "The purpose of this enactment is to clothe the trial judge, who enjoys the advantage of meeting the parties and witnesses face to face, with a wide discretion to be exercised in furtherance of substantial justice. He should be satisfied with the justice of the verdict, otherwise, it is his duty to set it aside. . . . With respect to the ground for a new trial under consideration, the judge is invested by the statute with the functions of a trier of fact and his discretion is limited only by the rule that it must not arbitrarily be exercised but must rest on a reasonable foundation of fact." [Ridge v. Johnson, 129 Mo. App. 541, 107 S. W. 1103; see, also, Rickroad v. Martin, 43 Mo. App. 597; Sly v. Union Depot R. Co., 134 Mo. 681, 36 S. W. 235.] In the case at bar there was nothing to satisfy the trial court that perjury or mistake had been committed by plaintiff's

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witness, except the testimony of interpleader's witnesses and the *ex parte* and, to some extent, contradictory, affidavits which interpleader filed with the motion for a new trial. Its determination of the matter must necessarily have depended upon its view of the mere credibility of the witnesses, with which it is not our province to interfere.

As to the ninth ground, viz.: "interpleader was surprised by the testimony offered by plaintiff to the effect that the said hoops were not marked when levy was made, as this fact was not denied at the hearing before the justice of the peace," the following, quoted from the decision of our Supreme Court in Thiele v. Citizens' Ry. Co., 140 Mo. 319, l. c. 338, 41 S. W. 800, is a sufficient response:

"It is a general rule that each party must understand his case and come prepared to meet the case made by his adversary; therefore, a party cannot be surprised that his adversary introduced testimony in support of the issues made by the pleadings, even though such testimony is false. [Hayne's New trial, par. 79.] The rule is thus forcibly stated by PHILLIPS, P. J., in Bragg v. City of Moberly, 17 Mo. App. 221. 'If a party be surprised by an unforseen occurrence at the trial, he should make his misfortune known to the court instantly and ask for a reasonable postponement to enable him to produce the countervailing proof. If he can relieve himself from his embarrassment by any mode, either by a nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chance of a verdict, but must at once fortify his position by resorting to all available modes of present relief.'"

In the case at bar, the only issue was whether the interpleader had taken such actual possession of the hoops as was required by law of a vendor or of a mortgagee whose mortgage was not recorded or filed. As to this, the interpleader had the burden of proof.

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In an attempt to sustain this burden, it introduced evidence to the effect that it had marked or branded the hoops as its property prior to the levy of the attachment. The testimony introduced by the plaintiff, which interpleader claims was a surprise, merely contradicted the testimony which the interpleader had previously introduced. It is clear, under the general rule just quoted, that the interpleader could not be surprised that its adversary introduced such testimony, and if it was, it was its duty to make known the fact of its surprise at the trial, a thing which it neglected to do. Recognizing the rules above quoted, the judgment cannot be reversed on the ninth ground.

It appearing then that the record is barren of error warranting a reversal of the judgment, the judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

GEORGE W. LOCKE, Respondent, v. JOEL W. BOWMAN et al., Appellants.

St. Louis Court of Appeals, November 12, 1912.

1. **LIFE INSURANCE: Assignment of Policy: Reassignment: Rights of Assignee.** Where a life insurance policy is assigned and the assignee assigns it to another, the latter takes no greater rights in the policy than his assignor had.

2. **———: ———: No Insurable Interest: Validity of Assignment: Rights of Creditors.** An assignment of a life insurance policy to one who has no interest in the life of insured is prima facie void, unless he is a creditor of insured, in which event it is valid only to the amount of the advances made.

3. **———: ———: ———: ———: ———: Establishing Right: Burden of Proof.** Where the assignee of a life insurance policy had no interest in the life of insured, and the latter brought an action to have the assignment declared a mere pledge to secure certain indebtedness, the assignment being prima facie void beyond the amount of the admitted indebtedness, the *onus* was on the assignee to show such facts as would render it valid and binding beyond such amount.

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4. ———: ———: ———: ———: ———: ———: ———: **Facts Stated.** The insured in a life insurance policy executed an assignment of the policy. The assignment was absolute in form, but insured claimed it was made to secure an indebtedness owing by him to the assignee. The latter, in turn, pledged the policy with a third person, and the latter, upon foreclosure of the pledge, bought the policy. The insured brought action to have the court declare the latter to be the holder of the policy only to secure the amount to secure which it was originally assigned. Defendant pleaded in his answer, among other defenses, that the policy was originally assigned to secure a much larger indebtedness than alleged in the petition. *Held*, that defendant had no greater rights in the policy than his assignor had; *held, further*, that, inasmuch as defendant had no interest in the life of insured, the assignment was prima facie void beyond the amount of the admitted indebtedness, and that the *onus* was on defendant to show such facts as would render it valid and binding beyond such amount.

5. **ESTOPPEL: Laches: Burden of Proof.** One setting up estoppel or laches has the burden of making out the facts upon which such defense rests.

6. **LIFE INSURANCE: Assignment of Policy: Estoppel: Pledges.** The rule that the owner of personalty will be estopped from setting up his title as against a pledgee of it, where he has clothed the pledgor with evidence of ownership of it, has no application to a life insurance policy.

7. ———: ———: **Estoppel: Laches: Petition Construed.** A petition, in an action to redeem a life insurance policy, alleged that plaintiff, the insured, executed, on September 14, 1905, an assignment of the policy, which was absolute in form but which in fact was made to secure an indebtedness owing by plaintiff to the assignee; that the latter, in turn, pledged the policy with defendant to secure a sum far in excess of plaintiff's indebtedness to said assignee; that default having been made in the payment owing by said assignee to defendant, the latter caused the policy to be sold to satisfy said indebtedness, and at said sale became the purchaser of it; that said assignee died in June, 1907, and at that time plaintiff was indebted to him in the amount of the original indebtedness and interest thereon. The prayer was, that the court declare defendant to be the holder of the policy only for the purpose of securing such indebtedness. *Held*, that plaintiff was not estopped to set up his title as against defendant, although he delivered the policy, together with an assignment, absolute in form, to defendant's assignor; *held, further*, that the petition does not show plaintiff was guilty of laches in failing to bring the

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suit before the death of defendant's assignor, since it does not appear that defendant was injured by the delay and that plaintiff had knowledge that his rights were being infringed and had an opportunity to establish them, before said assignor died.

8. **LACHES: Constituent Elements.** In order to defeat an action on the ground of laches, a showing of mere delay or death of a participant is not sufficient, but it must also appear that the other party was injured by the delay and that plaintiff had knowledge of the infringement of his rights and had an opportunity to establish them.

9. **LIFE INSURANCE: Assignment of Policy: Action to Redeem: Tender.** In an action in equity to redeem a life insurance policy in the hands of an assignee under an assignment which was absolute on its face but which in fact was given to secure certain indebtedness, allegation and proof of a tender, before suit brought, of the amount of such indebtedness was unnecessary.

10. **APPELLATE PRACTICE: Pleading: Amendments.** Where the trial court ordered a reply to be amended by striking out a word, such amendment will be regarded, on appeal, as having been made, whether it was in fact made or not.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

AFFIRMED AND REMANDED.

Hall & Dame for appellant.

(1) Plaintiff's bill herein does not state facts sufficient to constitute a cause of action against defendant Bowman. (a) One who leaves his property in the possession of another and knowingly allows that other to hold himself out to the world as the owner, will be estopped as against creditors of such other person from claiming the property as his own. McDermot v. Barnum, 19 Mo. 204; Rieschieck v. Klingelhoefer, 91 Mo. App. 431; Klingelhoefer v. Smith, 171 Mo. 455; Riley v. Vaughn, 116 Mo. 169. (b) Courts of equity view with disfavor suits that are brought long after the transactions litigated have occurred, and long after death has sealed the lips of those fa-

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miliar with the occurrences. Lenox v. Harrison, 88 Mo. 491; Burdette v. May, 100 Mo. 13; Brown v. Assurance Soc., 75 Minn. 412; Kroening v. Goehri, 112 Mo. 641. (c) A person seeking equity must first do equity. Plaintiff in his bill does not allege that he tendered defendant Bowman, before suit, the amount said Bowman advanced on said policy. McClintock v. Bank, 120 Mo. 133; Talty v. Freedman's Sav. & Tr. Co., 93 U. S. 321; Scharf, Admr. v. Fries, 90 Mo. App. 111. (2) The averments in defendant's answer are not denied by plaintiff and therefore must stand admitted. The pleading which plaintiff styles a reply does not deny the averments of defendant's answer. The language of the reply that plaintiff denies the new matter of defendant's answer is no denial since it does not point out what the allegations of new matter are. Betz v. Telephone Co., 121 Mo. App. 473; Dezell v. Casualty Co., 176 Mo. 253; Sundmacher v. Lloyd, 135 Mo. App. 517; R. S. 1909. sec. 1830; Young v. Schofield, 132 Mo. 650. (3) A policy of life insurance is assignable as any other chose in action. McFarland v. Creath, 35 Mo. App. 112; Floyd v. Ins. Co., 72 Mo. App. 459; Kelly v. Ins. Co., 148 Mo. 249; St. John v. Ins. Co., 13 N. Y. 31; Brown v. Ins. Co., 75 Minn. 412; Brockway v. Ins. Co., 9 Fed. 249; Ins. Co. v. Armstrong, 117 U. S. 591; A. O. U. W. v. Brown, 112 Ga. 545; Fitzpatrick v. Ins. Co., 56 Conn. 116; Chamberlain v. Butler, 61 Neb. 730; Ins. Co. v. Liersch, 122 Mich. 436; Strike v. Ins. Co., 95 Wis. 583; Bowen v. Association, 63 Conn. 460; Rittler v. Smith, 70 Md. 261; Bursinger v. Bank, 67 Wis. 75; Souder v. Home Friendly Soc., 72 Md. 511; Clogg v. McDaniel, 89 Neb. 416; Ins. Co. v. Allen, 138 Mass. 24; Dixon v. Ins. Co., 168 Mass. 48; Murphy v. Red, 64 Miss. 614; Johnson v. Van Epps, 14 Ill. App. 201; Stoelker v. Thornton, 88 Ala. 241; Olmstead v. Keyes, 85 N. Y. 598; Steinbach v. Diepenbrock, 158 N. Y. 24. (4) The party who alleges that an assignment abso-

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lute on its face is given as security for a mortgage has the burden of proving that fact. Cobb v. Day, 106 Mo. 296; Worley v. Dryden, 57 Mo. 226; Dixon v. Ins. Co., 168 Mass. 48. (5) There is not any presumption in favor of an assignor of a life insurance policy that his assignment of said policy absolute in form is for less than the full value of the policy. (6) Defendant's denial of allegation of the complaint or bill that the assignment was given as security instead of as an absolute sale, called upon plaintiff for his proofs, notwithstanding express allegations containing affirmative pleas by the defendant. Offenstein v. Gehner, 223 Mo. 318; Bolingford v. G. L. of A. etc., 42 N. Y. Supp. 881; Railroad Co. v. Kerr, 17 Barb. 581; Amandor Co. v. Butterfield, 51 Cal. 526; Batto v. Vandament, 67 Cal. 332; Homire v. Rodgers, 74 Ia. 306; Connolly v. Clark, 45 N. Y. Supp. 1042.

J. D. Johnson and *Loomis C. Johnson* for respondent.

(1) The defendant below (appellant here) in his separate answer admitted plaintiff's cause of action; hence the order of dismissal was properly vacated. Facts admitted by the pleadings need not be proven. McGraw v. O'Neil, 123 Mo. App. 696; McKenzie v. Railroad, 216 Mo. 1; Chouteau v. Chrisman, 204 Mo. 371. (2) Assignments of policies of life insurance, though absolute on their face and for value, are prima facie void unless the insurable interest of the assignee in the life of the insured is made to appear. Singleton v. Ins. Co., 66 Mo. 72; Haeusner v. Ins. Co., 47 Mo. App. 336; Deal v. Hainly, 135 Mo. App. 516; Ins. Co. v. Rosenheim, 56 Mo. App. 33; Ins. Co. v. Richards, 99 Mo. App. 91; Warnack v. Davis, 104 U. S. 783; Whitmore v. Knights & L. of H., 100 Mo. 46. (3) (a.) Where the insurable interest of the assignee of a policy of life insurance does not appear, the burden of proof is on an assignee

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claiming under the policy to prove his insurable interest. Singleton v. Ins. Co., 66 Mo. 74. (b.) An assignee of a life insurance policy can convey to his assignee no greater interest therein than he (the first assignee) possesses. Haeusner v. Ins. Co., 47 Mo. App. 343; Deal v. Hainly, 135 Mo. App. 514. (4) Respondent's petition alleges that the consideration for the assignment of his $5000 policy to Schwarzkopf was the sum of $250. This the appellant admitted and stated that there was additional consideration passing from Schwarzkopf to respondent, in the shape of premiums paid. Under the foregoing authorities, therefore, the burden was on appellant to prove Schwarzkopf's interest, in excess of the $250 pleaded by respondent and to show, before he would be entitled to a decree, that that interest equaled the face value of the policy. (5) Appellant's contention that because respondent did not make tender to appellant Bowman therefore that he (respondent) is not entitled to recover is not in accord with the weight of authority in this State. Kline v. Vogel, 90 Mo. 244; Joplin v. Walton, 138 Mo. 485; Haydon v. Railroad, 222 Mo. 135. (6) Appellant having gone to trial on the pleadings cannot now be heard to question the sufficiency of respondent's reply. Roden v. Helm, 192 Mo. 83; Zangher v. Mercantile Co., 110 Mo. App. 386. (7) Appellant's sixth point does not correctly state the law as applicable to pleadings in cases involving the validity of assignments of policies of life insurance.

STATEMENT.—*In Equity.* When this cause came on for hearing in the circuit court, the question was raised as to whether under the pleadings the plaintiff or the defendant had the burden of proof. The trial court decided that plaintiff must assume that burden, whereupon, the plaintiff declining to offer any evidence, the court rendered judgment dismissing his bill. After-

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wards, because it considered that it had erred in ruling that plaintiff had the burden of proof, the court granted a new trial on plaintiff's motion, and the defendant has appealed.

The sole question presented on this appeal is whether the plaintiff or the defendant had the burden of proof under the pleadings.

The petition alleges in substance that the plaintiff procured from an insurance company a paid-up life insurance policy for $5532 on his own life, payable to Fannie G. Locke, his wife, if living at his death, and if not living at his death, to the executors, administrators or assigns of plaintiff; that thereafter, on September 14, 1905, plaintiff and his said wife assigned the policy to E. M. Schwarzkopf in consideration of the latter paying $250 which the plaintiff owed the St. Louis Trust Company; that said assignment, although on its face an absolute assignment, was, in fact, executed as security to Schwarzkopf for the repayment to him of said $250; that Schwarzkopf died in June, 1907, and at the date of his death plaintiff was indebted to him in the sum of $250, advanced as aforesaid, together with interest thereon from September 14, 1905, such advance being secured by the aforesaid pledge of the policy; that, prior to the date of his death, Schwarzkopf pledged the policy with defendant Bowman as security for advances made by said Bowman to Schwarzkopf in a sum far in excess of the amount of plaintiff's indebtedness to Schwarzkopf, and thereafter, Schwarzkopf making default in the amount owing to Bowman, the latter caused the policy to be sold to satisfy Schwarzkopf's indebtedness to him and at said sale purchased the policy himself and is now in possession, claiming to be the owner thereof; that Fannie G. Locke is dead. Plaintiff further avers his readiness and willingness to pay to either defendant the said sum of $250 together with interest thereon and to do all things which, in equity,

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he should do to protect the interests of the defendants. The prayer of the petition is, that "the court adjudge and decree that the said policy is now held by the said Bowman only as security for the payment of the said sum of $250, with interest due thereon from September 14, 1905, and, upon payment by the said plaintiff to said Bowman of said amount, the court order and direct the said Bowman to surrender to plaintiff the said policy herein described. And plaintiff prays for such other and further judgments, orders and decrees as may be necessary to fully protect his interests and the rights and interests of the defendants."

The defendant executrix does not appear to have answered or appeared, though duly summoned. Defendant Bowman answered, admitting the transaction as alleged, except that he avers that the consideration for the assignment to Schwarzkopf, in addition to the payment by Schwarzkopf of $250 to the trust company, "was for premiums paid on the policy by Schwarzkopf and other valuable consideration." He denies that the assignment to Schwarzkopf was executed as a mere assignment to secure the repayment of the $250, and avers that it was in fact "an unconditional and an absolute sale and assignment of said policy in writing for a valuable consideration." He pleads that the assignment, being absolute on its face, plaintiff is estopped from denying that it was so in fact. He alleges that the amount of the loan for which Schwarzkopf pledged the policy to him was $2000, which was evidenced by a note; that the sale by defendant Bowman, at which he bought the policy in, was made in accordance with the terms of the pledge, etc., and that by said sale he became the absolute legal and beneficial owner of the property. Defendant also states facts relied upon by him as creating an estoppel, and constituting laches, sufficient to bar plaintiff from relief. Defendant further pleads that he made

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the loan to Schwarzkopf in good faith, relying on the assignment of the policy to Schwarzkopf as an absolute one, and without knowledge or notice of plaintiff's claim or alleged equities.

The reply was a general denial of "each and every allegation of new matter" in the answer contained.

When the case was called for trial and the pleadings were read, the trial judge asked if the reply contained the word "new." Being answered in the affirmative, he said "You better strike it out. The Supreme Court has held that the court and the other party are not bound to plow through the pleadings to find out what is new matter and what is not. Just let it be a general denial of the allegations of the answer."

CAULFIELD, J. (after stating the facts).—It is clear that, considering the state of the pleadings, the trial court erred in holding that the burden of proof lay with the plaintiff and not the defendant, and did not err in granting plaintiff a new trial on that account. On the admitted facts, defendant has no right except such as he derived through Schwarzkopf, who, in turn, was a mere assignee of the policy. He acquired no greater right in the policy than Schwarzkopf had. [Heusner v. The Mutual Life Ins. Co., 47 Mo. App. 336, 345.] The assignment to Schwarzkopf, being made to one having no interest in the life of the insured, was prima facie void and if he was a creditor it could be valid only to the amount of his advances. [Deal v. Hainley, 135 Mo. App. 507, 116 S. W. 1; Jenkins v. Morrow, 131 Mo. App. 288, 109 S. W. 1051; Mut. Life Ins. Co. v. Richards, 99 Mo. App. 88, 72 S. W. 487; Singleton v. Ins. Co., 66 Mo. 63; Warnock v. Davis, 104 U. S. 775; Heusner v. Mut. Life Ins. Co., supra.] Being prima facie void, the onus was on the one asserting its validity to show such facts as rendered it valid and binding. [Singleton v. St. Louis

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Mut. Ins. Co., 66 Mo. 63, 75; Ryan v. Metropolitan Life Ins. Co., 117 Mo. App. 688, 93 S. W. 347.] The plaintiff admitted its validity to the amount of $250 and interest, and to that extent defendant might have enforced his right without offering evidence. He could not, however, rest his claim for a larger amount upon that admission, but must show that Schwarzkopf advanced the larger amount claimed. As the case stood on the pleadings, with both parties declining to offer evidence the plaintiff would have been entitled to a decree as specifically prayed for in his petition.

As to estoppel and laches, the onus is on the party setting them up to make out the facts on which they rest. The petition does not disclose such facts. It does disclose that plaintiff delivered the policy to Schwarzkopf, together with an assignment which is absolute in form, and that Schwarzkopf pledged it to defendant, but the rule that the owner of personalty will be estopped from setting up his title as against a pledgee of it when he has clothed the pledgor with evidence of ownership of it has been held to have no application to a life insurance policy. [Heusner v. Ins. Co., supra.] Neither does it appear on the face of the petition that plaintiff has been guilty of such laches as to bar his right to relief in equity or to put him to an explanation of his delay in bringing suit. It is true that plaintiff alleges that Schwarzkopf died in June, 1907, having theretofore pledged the policy with defendant Bowman for a larger sum, etc., but that is not sufficient. There must be something more than mere delay or death of a participant, before the relief asked should be refused. It must appear that the other party was injured by the delay, and that plaintiff had had knowledge of his rights being infringed and opportunity to establish them. [St. Louis Safe Deposit & Savings Bank v. Kennett's Est., 101 Mo. App. 370, 74 S. W. 474.] The cases which hold that equity views with disfavor a suit that is brought after

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the death of a party acquainted with the "whole business" proceed on the theory that the plaintiff had knowledge of the infringement upon his rights and ample opportunity to establish them before the party died. [Lenox v. Harrison, 88 Mo. 491; Burdett v. May, 100 Mo. 13, 12 S. W. 1056; State ex rel. v. West, 68 Mo. 229; Dexter v. Macdonald, 196 Mo. 373, 95 S. W. 359.] The petition in this case does not disclose that defendant was injured by the delay or that plaintiff had knowledge of his rights and opportunity to establish them before Schwarzkopf died, or, indeed, for any considerable time before bringing this suit.

It was unnecessary for plaintiff to allege and prove a tender before suit of the amount of the debt necessary to be paid in order to redeem the policy, this being a proceeding in equity to redeem. [Haydon v. Railroad, 222 Mo. 126, 121 S. W. 15.]

Defendant's counsel contend that as the reply denied the "new matter" of defendant's answer it is insufficient and therefore the averments in the answer must stand as admitted. The contention will be ruled against the defendant. The trial court having ordered the reply to be amended so as to meet that objection it is to be regarded here as having been made, and it is immaterial whether the verbal changes were made or not. [Underwood v. Bishop, 67 Mo. 374; Shantz v. Shriner, 167 Mo. App. 635, 150 S. W. 727, (Decided October 8, 1912).]

The judgment is affirmed and the cause remanded. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

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STATE OF MISSOURI, Respondent, v. FRANCIS CORDIA, Appellant.

St. Louis Court of Appeals, November 12, 1912.

INTOXICATING LIQUOR: Illegal Sales: Sufficiency of Record. In a prosecution for the illegal sale of intoxicating liquor by a merchant, in violation of Sec. 11640, R. S. 1909, *held* that the record does not disclose any error or irregularity justifying a reversal of the judgment of conviction.

Appeal from Washington Circuit Court.—*Hon. Joseph J. Williams,* Judge.

AFFIRMED.

M. E. Rhoades and *Byrns & Bean* for appellant.

W. A. Cooper and *S. G. Nipper* for respondent.

CAULFIELD, J.—Defendant was indicted, tried and, on September 7, 1910, convicted, under section 11640 of the Revised Statutes of Missouri 1909, for selling intoxicating liquor in less quantity than five gallons, he being a merchant, having a merchant's license authorizing him to deal in goods, ware and merchandise, but no dramshop license. He appeals to this court but has assigned no error and filed no brief here. Having examined the record we find no error, insufficiency, or irregularity in the indictment, trial or other proceedings, justifying a reversal of the judgment, and find that the evidence warrants the conviction and the instructions fairly present the case to the jury.

The judgment is, therefore, affirmed. *Reynolds, P. J.,* and *Nortoni, J.,* concur.

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STATE OF MISSOURI, Respondent, v. FRANCIS CORDIA, Appellant.

St. Louis Court of Appeals, November 12, 1912.

INTOXICATING LIQUOR: Illegal Sales: Sufficiency of Record. In a prosecution for the illegal sale of intoxicating liquor by a merchant, in violation of Sec. 11640, R. S. 1909, *held* that the record does not disclose any error of irregularity justifying a reversal of the judgment of conviction.

Appeal from Washington Circuit Court.—*Hon. Joseph J. Williams,* Judge.

AFFIRMED.

M. E. Rhoades and *Byrns & Bean* for appellant.

W. A. Cooper and *S. G. Nipper* for respondent.

CAULFIELD, J.—Defendant was indicted, tried and, on September 3, 1910, convicted for selling intoxicating liquor in less quantity than five gallons, he being a merchant, having a merchant's license authorizing him to deal in goods, wares and merchandise, but no dramshop license, and the prosecution being under section 11640 of the Revised Statutes of Missouri, 1909. He appeals to this court but assigns no error and does not file a brief in the cause.

An examination of the record fails to disclose any error or insufficiency in the indictment or other proceedings, or any error or irregularity in the trial justifying a reversal of the judgment. The evidence warrants the conviction and the instructions fairly present the case to the jury.

The judgment is, therefore, affirmed. *Reynolds, P. J.,* and *Nortoni, J.,* concur.

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R. C. MATTHEWS, Respondent, v. BERT EBY, Appellant.

St. Louis Court of Appeals, November 12, 1912.

1. **FRAUD AND DECEIT: Debt Fraudulently Contracted: Actionable Fraud: Implied Misrepresentations.** In order for a debt to be fraudulently contracted on the part of the debtor, he must have been guilty of some material deceptive act, word or concealment, done or suffered by him with the intent to induce the opposite party to consent to the debt, and the latter must have relied upon such false acts or manifestations of the debtor and yielded his consent to the contract on the faith thereof.

2. **ATTACHMENT: Fraud and Deceit: Debt Fraudulently Contracted: Implied Misrepresentations.** After the purchase price of chattels had been agreed upon and just before they were turned over to the buyer, he told the seller that he could not pay the purchase price then because he did not have his check book with him, and that he would send the seller a check when he got home. In an action by the seller by attachment, on the ground the debt was fraudulently contracted, it being admitted by defendant that he had no money in bank at the time of the transaction, *held*, that defendant's statement amounted to an affirmation that the money was in bank to meet the check and that it was a mere matter of his getting to his check book in order to make payment; that such affirmation was false; that it related to a material fact; that plaintiff's reliance upon it may be inferred; and that the false impression was given by defendant to induce plaintiff to consent to the debt and that plaintiff yielded his consent on the faith thereof, may be inferred; and hence it is *held*, that there was sufficient evidence to warrant a finding that the debt was fraudulently contracted so as to justify an attachment under Sec. 2294, R. S. 1909.

3. **———: Jurisdiction: Venue.** Where an action by attachment is commenced in the county in which plaintiff resides, but in which defendant does not reside, and summons is not served on defendant in such county, the jurisdiction of the court depends upon the validity of the attachment. [See Sec. 1751, R. S. 1909.]

4. **———: ———: Unlawful or Fraudulent Levy.** An attachment levy effected by unlawful or fraudulent means is illegal and void and confers no jurisdiction.

5. **JUSTICES' COURTS: Action: Splitting Cause of Action: Attachment.** Where the debt owing a creditor was in excess

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of the jurisdiction of a justice of the peace, and, in order to give the justice a fictitious appearance of jurisdiction, he split his cause of action and brought two suits and sued out two writs of attachment in aid thereof, the levy under said writs amounted to a fraud in law.

6. **ATTACHMENT: Jurisdiction: Fraudulent Levy.** Where a creditor, desiring to prevent the removal from the county in which he resided of property of his debtor, temporarily there, having a single cause of action for a sum too great for the jurisdiction of a justice of the peace, split it and had the property seized on two attachments issued by a justice, and subsequently, in the absence of the debtor, dismissed said attachments and had the property seized on an attachment in a suit in the circuit court, the levy under the latter attachment, having been effected by means of the other fraudulent attachments, gave no jurisdiction.

7. **APPELLATE PRACTICE: Binding Effect of Theory at Trial: Attachment.** The denial of a motion to dismiss an attachment on the ground that it was obtained by means of a fraudulent levy and that the court, therefore, had no jurisdiction will be reviewed, on appeal, and the question of jurisdiction raised by it determined, where the parties and the trial court proceeded on the theory it was a proper mode of raising that question.

8. **ATTACHMENT: Trial Practice: Jurisdiction: Mode of Presenting Question.** In an action by attachment, whether a motion to dismiss is a proper mode of presenting the question that the court did not have jurisdiction because of the fact that the levy was effected by fraudulent means, *quaere*.

Appeal from Scott Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED (*with directions*).

Marsh Arnold and *Brown & Gallivan* for appellant.

(1) The court should have sustained defendant's motion to dismiss for want of jurisdiction, in that plaintiff wrongfully attached the mules in the justice's court. Rosencranz v. Dry Goods Co., 175 Mo. 518. (2) The court erred in overruling defendant's motion to dismiss for want of jurisdiction, in that plaintiff split his demand and brought two suits in the justice's

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court, attaching the property, and states that he did so to hold it in Scott county. Capital City Bank v. Knox, 47 Mo. 333; Byle v. Jones, 79 Mo. 261; Rosencranz v. Dry Goods Co., 175 Mo. 518.

Joe Moore for respondent.

(1) The defendant obtained the mules in controversy by representing to the plaintiff that he had money in the bank with which to pay for them, and that the reason he did not do so was because he had left his check book at home, when, as a matter of fact, he did not have any money in the bank. This was such a fraudulent misrepresentation as will support attachment. Warner v. Kade, 15 Mo. App. 600; Ring v. Paint Co., 44 Mo. App. 111. (2) The defendant brought the property attached into Scott county; it was not brought there through any act or connivance of the plaintiff; it was within the jurisdiction of either the justice or circuit court so far as the *situs* of the subject-matter of the suit was concerned. The law provides that suits by attachment shall be brought in the county in which the property may be found. Sec. 563, R. S. 1899; Carter v. Arbuthnot, 62 Mo. 582; Huxley v. Harold, 62 Mo. 516; McGrew v. Foster, 54 Mo. 258.

CAULFIELD, J.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of the act of the Legislature, approved June 12, 1909. [See Laws of Missouri, 1909, p. 396; see, also, sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge NIXON of that court, as will appear by reference to Matthews v. Eby, 149 Mo. App. 157, 129 S. W. 1016. Subsequently, the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this

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court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court, on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

The case has been argued and submitted here and duly considered. Upon reading the record we are satisfied with and adopt, so far as it relates to the question whether the debt sued for was fraudulently contracted, the statement of facts set forth in the opinion of the Springfield Court of Appeals above referred to, as follows:

"This was an action brought in the circuit court of Scott county on an account in the sum of $375, and a writ of attachment was sued out in aid thereof, the ground for attachment being that the debt sued for was fraudulently contracted. This writ was levied on three mules, the subjects of this controversy. The defendant filed a plea in abatement which, among other things, denied that the debt sued for was fraudulently contracted. The verdict of the jury sustained the attachment. The defendant then answered, but upon plaintiff's motion, a part of the answer was stricken out, and defendant declining to plead further, judgment was rendered for plaintiff for the amount sued for. Defendant has appealed and insists that the attachment should not have been sustained because the evidence does not show that the debt sued for was fraudulently contracted.

"This litigation had its inception in the sale of three mules. The evidence shows that plaintiff was a dealer in mules, maintaining a mule barn in Sikeston, Scott county, Missouri. That about the 1st of April, 1908, defendant appeared at plaintiff's mule barn, and, after having examined several mules, had two hitched to a wagon and tried them and said he would take them, together with another mule he had examined.

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The two mules were priced at $190 each and the separate mule at $175, making a total of $555, but plaintiff told defendant he would sell the three for $550. There is a direct conflict in the evidence as to what then occurred. Plaintiff testified that defendant went up town and then came back and caught the mules and said: 'I haven't got my check book here and I can't pay you for this now, but I will send you a check when I get home.' Plaintiff says he went up town and asked a man who was well acquainted in that country what he thought about letting the mules go on that kind of a promise and that he was told it would be perfectly safe. That plaintiff then told defendant he could take them, but to send the check at once. That he waited about two weeks and then wrote to defendant. Not receiving a reply, he wrote again, but to no avail. Plaintiff says that after about five weeks he sent Alfred Emery to the defendant; that the defendant sent back $100 with a promise to pay the balance at once; that after waiting about a week longer, he wrote again, and then defendant came from his home in New Madrid county to Sikeston and wanted to turn back the two mules which had been priced at $190 each, but plaintiff refused to take them and told defendant to get the matter settled up by the following Monday. That defendant returned on Monday and left the two mules at plaintiff's mule barn in plaintiff's absence. They met later, however, and had some words, defendant saying one of the mules was not worth $1.50. Plaintiff then offered him $150 for the mule but defendant would not take less than $165 which plaintiff refused to give because the mule had become lame and both of them had deteriorated in value. Defendant then paid him seventy-five dollars more, leaving a balance due of $375, and plaintiff prepared a note for that amount and gave it to the defendant with directions to get it signed by certain named persons so that he would have something to show for the sale.

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Plaintiff states that he then saw defendant 'acting peculiar' and that defendant slipped back and got the bridle he had had on one of the two mules which he had brought to the barn, and wrapped it up in his rain coat, walked around 'back there' a while, and then went out. That plaintiff was then convinced that defendant was trying to beat him by leaving the mules there anyhow. That he went out and found that defendant had also brought the third mule to town, and he at once started attachment proceedings and secured possession of the three mules. . . . Defendant's testimony was that he did not agree to send a check at once, but that he was to take the mules home and pay at a future date when his brother had secured some money on a loan; that nothing was said about a check; that the mules were warranted and that if they were not 'all right' defendant could return them. . . . Defendant's own evidence shows that he had no money in the bank, but was relying upon his brother to make a loan and obtain the money."

Our learned brethren of the Springfield Court of Appeals treated the case upon the foregoing facts as if there was nothing more, by way of fraud, than the defendant's promise to send defendant a check on his arrival home and concluded that such mere promise was not such a false representation as to constitute a fraud, though it was unperformed, citing Bullock v. Wooldridge, 42 Mo. App. 356; Stocking v. Howard, 73 Mo. 25. We cannot agree that the case should be so treated. In order for a debt to be fraudulently contracted on his part, "the debtor must have been guilty of some material deceptive act, word or concealment, done or suffered by him with the intent to induce the opposite party to consent to the debt. The opposite party must have relied upon such false acts or manifestations of the debtor, and yielded his consent to the contract on the faith thereof." [Finlay v. Bryson, 84 Mo. 664.] It is clear from this definition or rule

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that the false representation need not be express, but may be by conduct as well as by words; and such is the law. "If one intentionally acts in such a manner as to reasonably lead another to believe in the existence of facts which do not exist, and to act on such belief to his prejudice, it is as much a fraud as if he made a positive statement as to the existence of such facts." [14 Am. & Eng. Ency. of Law (2 Ed.), p. 30.] Thus, the drawing of a check upon a bank in which the drawer has no funds, and uttering it, is a fraud. It amounts to a false affirmation that the money is there to meet it. [Peterson v. Union Natl. Bank, 91 Am. Dec. 146, 52 Pa. St. 206.] Now, in the case at bar, the purchaser (defendant) did not actually draw the check, but he used the words which were equivalent as an affirmation. He said, "I haven't got my check book here and I can't pay you now, but I will send you a check when I get home." Who can doubt that this language implied that the money was in bank to meet the check as soon as it was given? It amounted to a statement that nothing stood between the parties and immediate payment but the absence of defendant's check book; that the money was in bank and it was a mere matter of getting to the check book in order that payment might be made. If such implication was not inevitable, it was at least permissible, and was a matter for the jury. That such implied affirmation was false is clearly shown and of course defendant must have known it was false. It related to a material fact, for if the money had been in bank, payment could have been made as soon as the defendant could reach his check book, while if the contrary was true the payment, or at least the time thereof, was dependent upon the ability of defendant's brother to make a loan, which was a very uncertain matter. That plaintiff relied upon such affirmation may be inferred, for it concerns a fact of which defendant had or was supposed to have knowledge, while the plaintiff had no such

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knowledge and no ready means of acquiring it. That the false impression was given by defendant with intent to induce plaintiff to consent to the debt and that plaintiff yielded his consent on the faith thereof may be inferred, for the language which created it was part of the negotiation for the sale of the mules and was followed immediately by the mules being turned over to the defendant. We are satisfied that there was sufficient evidence on which to base a finding that the debt was fraudulently contracted.

But the point is made that the judgment should be reversed by reason of the action of the circuit court in overruling defendant's motion to dismiss the cause for want of jurisdiction. The cause was instituted in the circuit court of Scott county and the jurisdiction depends upon the validity of the attachment, because the defendant resided in another county and was not served with summons in Scott county where the plaintiff resided. [Sec. 1751, R. S. 1909; Brackett v. Brackett, 61 Mo. 221.] The objection raised by the motion to dismiss is aimed at the means by which the court acquired jurisdiction through the execution of its attachment process.

The following facts were disclosed at the hearing upon the motion: On May 4, 1908, defendant resided and had the three mules in New Madrid county. The plaintiff resided and had his mule barn at Sikeston in Scott county. On that day the defendant came from New Madrid county to Sikeston in Scott county bringing with him the three mules. One, a bay mule, he drove, and the other two, the gray mules, he led. Arrived in Sikeston, he tied the bay mule at the usual hitching place, and took the two gray mules to plaintiff's mule barn, where he insisted on plaintiff taking them back as unsound. He testified that plaintiff did take them back and received a payment which finished paying for the bay mule. According to plaintiff's version, however, he refused to

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consent to any such arrangement and repudiated defendant's suggestion that the amount paid—$175—paid for one mule, and insisted that that sum was to be credited on the three mules; that the transaction had been a sale of three mules for $550 which could not be divided. Plaintiff told defendant to take the mules out of his barn and take them home. But, afterwards, the plaintiff testified, he judged from the defendant's actions that he was going to try to get out of town with the bay mule, leaving the gray mules on plaintiff's hands. He determined to stop this and keep the bay mule in Scott county by means of a writ of attachment from the justice of the peace, but as the sum demanded by him, $375, exceeded the amount of the justice's jurisdiction, he split his cause of action into two parts and sued out two writs before the justice for the two parts. Under the first writ, which was issued that day, May 4, 1908, he succeeded in having the bay mule seized and held by the constable before the defendant had a chance to get it and in spite of the defendant's attempt to do so. The constable and plaintiff then took the bay mule and put it with the two gray mules in the plaintiff's barn. Under the second writ, which was sued out the next day, May 5, 1908, the plaintiff had the two gray mules levied upon. All the mules continued to be kept in plaintiff's barn. On his cross-examination plaintiff frankly admitted that he divided his cause of action because he wanted to keep defendant from getting out of town with the mule and so as to get the matter into the justice court. The two attachment suits before the justice were set down for hearing on the 14th day of May, at which time the defendant was present, but the causes were continued on account of the sickness of the plaintiff. Thereafter, and while the defendant was out of the county and the mules were still in plaintiff's barn, held under the attachment, the plaintiff, without defendant's knowledge, dismissed both suits before the

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justice and immediately sued out the writ of attachment in the case at bar and caused the mules to be levied upon thereunder. He stated on cross-examination that he had had this attachment sued out right away after dismissing the others so that he could hold the mules as he was afraid "they would beat me out of them."

What is the effect of plaintiff's conduct as above disclosed upon this proceeding? The law is, that an attachment levy effected by unlawful or fraudulent means is illegal and void and confers no jurisdiction. [Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445; Drake on Attachment (6 Ed.), sec. 193.] This is upon the principle that courts will not lend their assistance to effectuate fraudulent or unlawful practices of suitors (Holker v. Hennessey, 141 Mo. 527, l. c. 536, 42 S. W. 1090); or, as otherwise stated, no one should be permitted to take advantage of his own wrong, and no lawful thing can stand on an unlawful foundation. [Rood on Attachments, sec. 186, citing Holker v. Hennessey, supra.] So, where one came into possession of goods of another in one state fraudulently or as a trespasser and took them into another state without the consent of the owner in order that a writ of attachment in that state could be levied upon them, it was held that the levy conferred no jurisdiction and was void. [Rosencranz v. Swofford Bros. Dry Goods Co., supra; Powell v. McKee, 4 La. Ann. 108.] A like ruling was made where a slave was decoyed into the jurisdiction of the court and there attached. [Timmons v. Garrison, 4 Humph. (Tenn.) 148.] So it was held that if the levy be made by means of a trespass, it is vitiated. [Bailey v. Wright, 39 Mich. 96.] Likewise, where the sheriff in one county seized the property, pretending that he seized it by virtue of a writ of attachment, and carried it back to his own county, where he made a formal levy under a writ in his possession, the levy was

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held to be void. [Pomroy v. Parmlee, 9 Iowa, 140.] In some instances, the fraudulent contrivance for obtaining possession of defendant's property involves an abuse of legal process—as in the case of Gilbert v. Hollinger, 14 La. Ann. 441, where, by means of a writ of attachment issued by the United States circuit court on a false affidavit that the defendant was a citizen of the state, goods were brought into the territorial jurisdiction of the state court and there attached under the state court writ on the ground that the defendant was a non-resident of the state. The case of Byler v. Jones, 79 Mo. 261, illustrates the same principle though it does not involve a seizure of property. It was there held that the criminal process of the State cannot be used to take a person from one county to another, for the purpose of having him served with civil process in the latter county, and that courts of the county into which he was so brought could acquire no rightful jurisdiction over his person in any civil proceeding by means of such a contrivance and wrong. There are many other cases, but the foregoing are sufficient to illustrate the principle involved.

Now, in the case at bar, in order to detain the property in Scott county in order that it might be subjected to attachment process therein, the plaintiff used the writs of attachment issued by the justice of the peace. The justice had no jurisdiction, as plaintiff knew, to issue a writ to secure the sum demanded by him, so, in order to accomplish his purpose regardless of the law, plaintiff conferred upon the justice a fictitious appearance of jurisdiction by splitting his cause of action, and bringing two suits. This was an unlawful practice, a proceeding which the law never tolerates. [Robins v. Conley, 47 Mo. App. 502; note to Reynolds v. Jones, 44 C. L. J. 306; Wagner v. Jacoby, 26 Mo. 532; Laine v. Francis, 15 Mo. App. 107.] It was a fraud in law. Yet by this means, fraudulent and unlawful attachment writs were procured, the

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property taken into custody and held until the defendant had left the county and was off his guard, when plaintiff dismissed the justice suits, and fearful of losing the unlawful advantage he had gained thereby, hurriedly sued out this writ and caused the property to be seized thereunder before defendant had a chance to be advised. It is clear that this proceeding is but an attempt to reap the fruits of the unlawful practice by which it was made possible, and to permit plaintiff to prevail herein would be but to lend our assistance to effectuate such unlawful practice. Under the law, it is our duty to refuse to do so, as it was the duty of the trial court. Jurisdiction cannot be unlawfully acquired as in this case.

We may add here that we have proceeded on the theory, without deciding, that the motion to dismiss was a proper mode of presenting the question of jurisdiction. We have done this because both the parties as well as the trial court proceeded on that theory and no question in that regard is raised here. That the trial court did not overrule the motion because it was an improper mode of raising the question of jurisdiction is made clear by the record, which discloses that the court struck out, on plaintiff's motion, a like plea to the jurisdiction from defendant's plea in abatement of the atttachment and from defendant's answer to the merits, the defendant duly excepting.

For the reasons above stated the judgment is reversed and the cause remanded with directions to the circuit court to set aside its order sustaining the attachment and enter an order dismissing the cause. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

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KNAPP BROTHERS MANUFACTURING COMPANY, Appellant, v. KANSAS CITY STOCK YARDS COMPANY OF MISSOURI et al., Respondents.

Kansas City Court of Appeals, November 25, 1912.

1. **MECHANIC'S LIENS: Liberal Construction: Name of Owner.** The mechanic's Lien Law should be liberally construed and an honest mistake, in the name of the owner of the building, not allowed to defeat the lien of the mechanic, when no rights of third persons have intervened.
2. **———: Notice: Name of Corporation.** When the property was correctly described but the notice was not addressed to the full name of the corporation, but served in the office of the corporation upon one of its officers, the notice was not invalidated thereby.
3. **———: Material Furnished: Inseparably Blended.** When the material furnished is inseparably blended in an account from which it cannot be distinguished, as to what is lienable, the entire lien is lost.
4. **———: Mistake in Notice: Subcontractor.** A mistake in the notice of a lien claim, given by a subcontractor to the owner, will not vitiate the notice unless it appears that the owner was misled thereby to his prejudice.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

REVERSED AND REMANDED.

Ellis, Cook & Barnett and *Burnham, Ellis & Yale* for appellant.

Lathrop, Morrow, Fox & Moore for respondents.

BROADDUS, P. J.—This is a suit to enforce a materialman's lien against the Stock Yards Building in Kansas City, Missouri. The defendant, Swenson Construction Company, had the contract for the erec-

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tion of the building, and did the work. Among other material that went into its construction was what is known as corner bead. The specifications called for Hunt's metal corner bead or its equivalent. The contractor finally decided to use the Knapp corner bead. Instead of obtaining it direct from the plaintiff they bought it from defendants, Richards & Conover, a corporation engaged in business in Kansas City, Missouri. The latter bought the material from defendant, Schuyler C. Hodge, who was doing business as the Building Specialty Company. The construction company paid Richards & Conover for the material and that company paid Hodge for it. Hodge failing to pay the plaintiff, it filed a lien on the building, and in due time instituted this suit. The original contractor, the Swenson Construction Company, bought the material from Richards & Conover to be used in the building. The latter bought it from Hodge, also to be used in the building. And the latter bought it from plaintiff to be so used. Richards & Conover made a written order on Hodge, or the Building Specialty Company, for the material. There seemed to have been some delay in the delivery of the goods, whereupon Richards & Conover's agent telegraphed to plaintiff and also wrote it to hurry up the shipment, and when the material arrived at Kansas City, he was on hand and opened the cars and helped check it out. This agent at the time had Hodge's bill for the goods and made a notation on it for the Swenson Construction Company. The goods were taken from the cars and hauled in Richards & Conover's wagons and delivered at the building in the course of construction.

The plaintiff refused to sell the material to Hodge of the Building Specialty Company, but agreed if he would give the name of the building in which it was to go and the name of the party to whom he was selling that it would ship the material. Hodge wrote to plaintiff that the material was to go into the Live Stock

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Exchange Building in Kansas City, and that Richards & Conover were the purchasers of the goods.

The plaintiff's lien called for 25,000 feet of beading, 580½ of which was made up of short lengths, the price of which was twenty-five dollars per thousand; the price of the balance was twenty-nine dollars per thousand. It was shown that 2626 feet of the bead was left over that did not go into the building. There was nothing to show to which class this left over material belonged as to price.

The lien was filed in the name of the Kansas City Stock Yards Company and that company was made defendant in the suit. The evidence disclosed that that company was a Kansas corporation that had gone out of business, and was succeeded by a corporation known as the Kansas City Stock Yards Company of Missouri; a Missouri corporation. However, notice of the lien and service of process were had against the latter. The plaintiff was allowed to amend its petition by inserting the words, "of Missouri" after the word company.

The plaintiff offered to credit its lien on the overplus beading at the highest price of the classification, at the rate of twenty-nine dollars per thousand.

The court's instruction to the jury practically was to return a verdict in favor of plaintiff against Hodge and in favor of all the other defendants. From the judgment, plaintiff appealed.

The judge announced the following reasons for denying appellant's lien, viz.: "First, that there is a complete variance between the lien and the parties that are defendants to this suit, in that the lien is filed against the Kansas City Stock Yards Company, which appears to be one corporation, and the suit is filed against the Kansas City Stock Yards Company of Missouri, and it appears that the latter company is the owner of the property against which the lien is sought to be obtained or secured, and that, therefore,

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there is a variance between the lien and the parties to the suit.

"Second, that the account sued on is for a certain number of lineal feet of this beading. A portion of this beading is charged at the rate of twenty-five dollars per thousand, namely, 580½ feet, and the remainder at twenty-nine dollars per thousand. The evidence shows that some 24,592 feet was used in the building, but there is no evidence as to whether the amount that was used was to be paid for at the rate of twenty-nine dollars per thousand for the whole of it, or a portion of it at the rate of twenty-five dollars per thousand, and, therefore, by reason of the uncertainty or failure of proof, the demurrer to the lien should be sustained."

The first question is as to the variance between the names of the Kansas City Stock Yards Company and the same name with the words added, "of Missouri." As it appeared that there was only one Stock Yards Company doing business in the city, and that the notice of the lien and of the suit was served upon such latter corporation it will be assumed that no one was misled by the mistake. It is held that the Mechanics' Lien Law should receive a liberal construction and that "an honest mistake in the name of the owner of the building will not defeat the lien of the mechanic, when no rights of third persons have intervened." [Sash & Door Works v. Shade, 137 Mo. App. 20.] In that case the name of James D. James was given as the owner of the building instead of John D. James, the correct name. And the holding is similar in Mississippi Planing Mill v. Church, 54 Mo. 520. It is held that: "Where the notice of filing the lien and petition stated that Rutledge was the owner instead of Eldridge, and the court at the trial permitted plaintiff to strike out the name of Rutledge wherever it appeared in the notice and petition, and insert the name of Eldridge, held, that no one was misled or

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deceived, or in the least prejudiced by the amendments, and that they were correctly made." [Darlington v. Eldridge, 88 Mo. App. 525.] An amendment to the petition allowing plaintiff to strike out one of them and substituting another was upheld as compatible under the code. [Dwyer v. Flanagan Bros., 87 Mo. App. 340.] Where the property was correctly described but notice was not addressed to the full name of the corporation, but was served in the office of the corporation upon one of its officers, the notice was not invalidated thereby. [Construction Company v. Jones, 60 Mo. App. 1.] There was no question but what the amendment was proper and that the lien on the building was not invalidated by the mistake in the name of the corporation.

Second: Was the lien invalid because it was shown that part of the material did not go into the building, and that there was no evidence to show whether it belonged to that part priced at twenty-five dollars a thousand or that at twenty-nine dollars a thousand? When we take into consideration the fact that the materialman cannot always know whether a part or the whole of the material furnished to a contractor actually goes into the construction of the building, we are bound, in fairness to him, to make a reasonable allowance for mistakes as to that matter on his account. If the mistake is an honest one for which he is not to blame, great injustice would be done if he should thereby lose his lien. It is true that the statute requires that he should make out a just and true account, but it does not mean that it should be invalidated for a minor mistake honestly made. The courts of this State have held that the statute is highly remedial and should receive a liberal construction.

It is true the evidence failed to show how much of each class of the material was used in the construction of the building, but it did show that the greater part of both was so used. But the difference was so

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small that if none of the lower priced material had been used, it would have amounted to about $14.51 at cost. And when plaintiff offered to give credit on its claim for the part left over at the higher price of twenty-nine dollars per thousand, no injustice was done defendants for they were justly indebted to plaintiff for the amount that actually went into the building at the greater price of twenty-nine dollars per thousand.

The defendants rely upon a number of cases to sustain the proposition that plaintiff's claim of lien is not such as the statute requires. For instance, it is held that when the material furnished is inseparably blended in an account from which it cannot be distinguished as to what is lienable and what is not lienable, the entire lien is lost. [Edgar v. Salisbury, 17 Mo. 271; Murphy v. Murphy, 22 Mo. App. 18; Dugan Cut Stone Co. v. Gray, 43 Mo. App. 671, and other cases.] But those authorities are not to the point in controversy. In the case of Lime Stone Company v. Methodist Church, 156 Mo. App. 671, Judge ELLISON drew the distinction between errors innocently made and where the mechanic "has so intermingled his lien claim with nonlien items so that the exact amount for which he is entitled to a lien cannot be readily ascertained by inspection of the claim, the whole lien must fail, whether the error was intentional or unintentional." There was no such intermingling in this instance. It was all lienable matter, sold and delivered for the purpose of being used in the construction of the building, and all was so used except a small portion, and the only difficulty was, the evidence did not disclose to what classification it belonged. But as the plaintiff offered to have it credited at the greater price, that was sufficient, and the defendants were in all good conscience chargeable with what did go into the building. To hold otherwise would be clinging to a mere technicality at the expense of undeniable justice. "Mis-

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takes in the notice of a lien claim, given by a subcontractor to the owner, will not vitiate the notice, unless it appears that the owner was misled thereby to his prejudice." [Construction Co. v. Jones, supra.]

But it is insisted that the judgment can be upheld for another reason, viz., that Richards & Conover and Hodge were not subcontractors. It is claimed that the former had no contract with the contracting company to furnish the beading to go into the building. We think this is a misconstruction of the testimony. It was shown that the company for the construction of the building made a verbal order upon Richards & Conover for the material to be used in the building, and that they furnished it for that express purpose. And it was further shown that Richards & Conover also purchased the material for the express purpose of filling the order of the contracting company, and the plaintiff sold the material on the credit of the building. Richards & Conover were subcontractors for furnishing the material to the contractor, and Hodges was a subcontractor to furnish it to Richards & Conover. Because they were materialmen did not prevent them from being subcontractors and there can be such a thing as a subcontractor to a subcontractor. [Construction Co. v. Jones, supra.] The cause is reversed and remanded. All concur.

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GATE CITY NATIONAL BANK, Respondent, v. FRANK F. SCHMIDT, Appellant.

Kansas City Court of Appeals, December 9, 1912.

1. **BILLS AND NOTES: Indorser after Maturity: Collateral Security.** The payee of a note, who indorses and delivers it to another, after maturity, as collateral security for the payment of another note, made by the payor, cannot be regarded as an accommodation indorser. His position is the same as it would have been had he, as payee, made an outright sale of the note.

2. **———: Notice of Protest: Accommodation: Indorser.** An indorser for whose accommodation a loan is made and who, on the dishonor of the note, is not entitled to due presentment and notice of protest, is one whose real relation to the maker is that of primary debtor.

3. **———: Indorsement after Maturity.** The indorsement of a negotiable promissory note by the payee after maturity is equivalent to drawing a new bill at sight and the same diligence in making demand and giving notice is required to charge the indorser.

4. **———: Demand: Reasonable Time.** When a note is indorsed after maturity, it becomes a note payable on demand, and demand must be made within a reasonable time. The delay of a year would be unreasonable and operate to discharge the indorser.

Appeal from Jackson Circuit Court.—*Hon. Jas. H. Slover*, Judge.

REVERSED.

Chas. R. Pence for appellant.

McCune, Harding, Brown & Murphy for respondent.

JOHNSON, J.—This is an action against the indorser of a negotiable promissory note. The material facts are as follows:

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Defendant Schmidt sold a restaurant in Kansas City to Frank J. Turnbull, Jr., and Ormus L. Brockett for $6000 and accepted the promissory notes of the vendees for part of the purchase price and at the same time received a chattel mortgage executed by them to secure the payment of the notes. The mortgage covered all the personal property included in the sale. The notes and mortgage were executed and delivered to defendant June 15, 1905. All of the notes except the one in suit were paid by Turnbull and Brockett and their vendee, Frank Hubbard, to whom they afterwards sold the business.

The note in suit was for the principal sum of $1500, bore interest from date at eight per cent per annum and by its terms fell due July 1, 1906. The interest was paid to June 30, 1906, and a payment of $300, on the principal was made June 25, 1906. At the time of those payments, which were indorsed on the back of the instrument, defendant indorsed an agreement to extend the time for the payment of the remainder to July 1, 1907. The note was not paid on the latter date and though Hubbard, in purchasing the business, had not assumed the payment of the indebtedness secured by the chattel mortgage, he had bought the property subject to that indebtedness and was the person to whom defendant was looking for the payment thereof. The amount due on the note on July 1, 1907, was about $1300 and being pressed by defendant for payment, Hubbard applied to the plaintiff bank for a loan of that amount and plaintiff agreed to make the loan on condition that its repayment be secured by an assignment of the note in suit and the chattel mortgage to the bank as collateral security. On July 8, 1907, Hubbard accompanied by defendant and his attorney, went to the bank and closed the transaction. Hubbard executed his promissory note to the bank for $1300, due in four months, and with the proceeds paid defendant the amount of the note in

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suit, whereupon defendant indorsed his name on the back and delivered the note and mortgage to the bank with the understanding that they would be held as collateral security for Hubbard's note. Defendant admits he was present during the entire transaction. He is a man of experience in business affairs and we shall not listen to his contention that he did not know he was assuming a liability to the bank when he indorsed the note without restrictions and delivered it to the bank. We shall assume that he knew Hubbard was borrowing money from the bank partly on the credit of his indorsement and that he lent his credit to Hubbard for the purpose of obtaining the money due him. Hubbard did not pay his note in full at maturity. He made a partial payment and obtained a renewal and continued to make partial payments until he had reduced the loan to $875, when he quit paying and became a bankrupt. Plaintiff then presented the note in suit at the bank where, by its terms, it was payable, and demanded payment. The demand was refused and thereupon the note was duly protested and notice of protest was given defendant. This occurred July 7, 1908, before the maturity of the last renewal note Hubbard had given plaintiff and was the first demand plaintiff made for the payment of the note in suit. The explanation offered by plaintiff for this long delay is that it was orally agreed by plaintiff, Hubbard and defendant when the loan was made, that Hubbard was to be allowed to pay off the loan gradually and to be granted necessary renewals of his note.

There are other facts in the record but those stated control the disposition of the case. The circuit court tried the case without the aid of a jury and rendered judgment for plaintiff. Defendant appealed. Counsel for plaintiff rely on certain provisions of the act relating to Negotiable Instruments enacted by the Legislature in 1905 (sec. 9971, *et seq.*, R. S. 1909) to support their position that defendant should be held as an

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indorser of the note in suit, but we find that law has no application to this case. The act did not go into effect until June 16, 1905. [See Session Acts, 1905, pp. 243, 265 and 330.] It contains the express enactment that "the provisions of this chapter do not apply to negotiable instruments made and delivered prior to the passage hereof." [Sec. 10164, R. S. 1909.]

The note in suit was made and delivered June 15, 1905, the day before the act went into effect. True the obligation of defendant as an indorser did not arise until after the act had become effective and the indorsement constituted a new and independent contract, but that contract grew out of the note which became an integral part of it and an action for the enforcement of such contract falls within the purview of the provision quoted which clearly was intended to except all negotiable instruments in existence at the time of the enactment of the new law from being, or in any wise becoming, subject to the operation of its provisions. The rights of the parties, therefore, are to be measured by the rules of law pertaining to negotiable instruments that were in force before the new act became a law.

Defendant, the payee of the note in suit, indorsed and delivered it to plaintiff after maturity as collateral security for the repayment of a loan made by plaintiff to Hubbard in part, at least, on the credit of that indorsement. Hubbard used the proceeds of the loan to pay defendant but instead of cancelling the debt and the note which evidenced it, defendant agreed by his indorsement that the note and its incident, the chattel mortgage, should not be discharged but should be kept alive and that the legal title to them should vest in plaintiff as security for Hubbard's debt to plaintiff. Defendant cannot be regarded as the party for whose accommodation the loan to Hubbard was made. He received the proceeds of Hubbard's loan, not as an accommodation from Hubbard but as the con-

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sideration he was entitled to receive for the transfer of his title in the note and mortgage to plaintiff. His position is the same as it would have been had he, as payee, made an outright sale of the note to plaintiff after maturity and effectuated such sale by his indorsement and transfer of the note. An indorser for whose accommodation a loan is made and who on the dishonor of the note is not entitled to due presentment and notice of protest, is one whose real relation to the maker is that of the primary debtor—the proper party to pay the note—and the reason he is not entitled to due presentment and notice is that "he can suffer no injury or loss by reason of the want of due presentment, since if it had been dishonored and he had been obliged to pay it, he could have no recourse over against the maker, any more than a drawer of a bill of exchange would have against his accommodation acceptor, in case of a dishonor by the latter." [Story on Promissory Notes (7 Ed.), sec. 268; 1 Am. & Eng. Ency. Law (2 Ed.), 339; Mosser v. Criswell, 150 Pa. St. 409.] In the case last cited, it is said:

"To have the money raised on a new note made by defendant was in a certain popular sense an accommodation, that is, a convenience, to the plaintiff, just as it is a convenience to a creditor who wants his money but cannot get it from his debtor in cash, to get payment by a note on which he can raise the money temporarily, though at the risk of an indorsement which he may ultimately have to pay. But this is very far from what the law means by accommodation paper."

If, in order to escape liability on account of his indorsement of the collateral note, defendant had paid Hubbard's note to plaintiff, he would have been entitled to recover the amount thus paid from Hubbard, the maker and the existence of such right would be utterly incompatible with the idea that he was an indorser for his own accommodation. An indorsement

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of a negotiable promissory note by the payee after maturity "is the equivalent to drawing a new bill at sight and the same diligence in making demand and giving notice is required to charge the indorser." [Light v. Kingsbury, 50 Mo. 331; Davis v. Francisco, 11 Mo. 572; Armstrong v. Armstrong, 36 Mo. 225; Beeler v. Frost, 70 Mo. 185; Jacobs v. Gibson, 77 Mo. App. 244.]

Such demand and notice must be made and given in a reasonable time and, as is said in Foley v. Brewing Co., 61 N. J. l. c. 430, the term, "a reasonable time," has reference to the ability of the holder and excludes any notion of credit to or indulgence of the maker. The rule thus is stated by SHAW, C. J., in Colt v. Barnard, 18 Pick. (Mass.) 260: "If it be asked, at what time payment of the note shall be demanded, the day originally named for payment having passed, the answer is obvious. As between maker and promisee, a note is payable on demand, at any time after it becomes due. When it is indorsed after due, it is in legal effect a note on demand, and is to be so understood by the parties, as if written 'on demand.' In that case, the law is well settled, the demand must be made within reasonable time, and if not paid, immediate notice of nonpayment must be given to the indorser."

Under this rule we do not hesitate in saying that a delay of a year in making demand and giving notice of dishonor was unreasonable and operated to discharge the defendant from his liability as indorser. The evidence of an oral agreement between plaintiff and defendant which was antecedent to or contemporaneous with the indorsement cannot be considered, since the only effect claimed for such agreement is that it varied the contract implied by law from the indorsement. The indorsement being in writing, the contract implied must be treated in all its terms as a written contract invulnerable to attack by proof of a contemporaneous oral agreement of different tenor.

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[Rodney v. Wilson, 67 Mo. 123; Beeler v. Frost, supra; 1 Daniels Negotiable Instruments (5 Ed.), 717, 718.] We regard as conclusive the following expression of the Supreme Court on this subject in Rodney v. Wilson, supra:

"It is evident that the verbal contract on which plaintiff relied, and the contract implied by the indorsement, are inconsistent with each other, and cannot stand together. One is an undertaking to be bound absolutely, the other an undertaking to be bound conditionally. The proof of the former has the effect of varying the latter. The rule is universal, that all prior and contemporaneous agreements are merged in the written undertaking. The contemporaneous parol agreement to be bound absolutely, that is, without demand and notice, must, therefore, yield to the agreement which the law declares arises out of the written indorsement, which is to be bound only after demand and notice. If the indorsee may thus qualify the legal effect of a regular blank indorsement, why may not the indorser be permitted, on the other hand, to escape all liability by showing that his indorsement was without recourse? [Charles v. Denis, 42 Wis. 56; Barry v. Morse, 3 N. H. 132; Bank of Albion v. Smith, 27 Barb. 489; Wilson v. Black, 6 Blackf. 509; Campbell v. Robbins, 29 Ind. 271, *contra*, Barclay v. Wesver, 19 Penn St. 396.] In all such cases as the present, we think the policy of the law requires that the paper 'shall tell its own story.'"

The judgment is reversed. All concur.

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MARTHA E. WAITE, Respondent, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 9, 1912.

1. **NEGLIGENCE: House Tracks: Town: Use by Public: Duty of Railway: Lookout.** Where railway tracks and its station house are located in the midst of a town, with main tracks on one side of the platform and a loading or house track on the other, with open ground or commons adjoining, and the public habitually use the grounds and house track in going to and from the station and beyond it, with the knowledge of the company, it becomes its duty to keep a lookout, at a place where he may see, for persons who may be on the track.

2. **———: ———: ———: Standing Cars on Crossing: Barring Way: Right of Pedestrians: Trespass.** Where a railway company places standing cars on a street crossing and leaves them there, a pedestrian on the street who finds his way barred may go around by crossing over the company's grounds and tracks, and in so doing he is not a trespasser; and if in so doing he is negligently injured or killed by the company's cars, damages may be recovered.

3. **———: ———: ———: Avoidance of Obstruction: Adjoining Property: Trespass.** If a temporary obstruction bars the progress of one traversing a public highway, he may avoid it by going over adjoining private fields, or property, without becoming a trespasser.

4. **———: ———: ———: Negligence: Humanitarian Rule: Consistency.** There is no inconsistency in the theories of care on the part of plaintiff and negligence of a defendant, and the humanitarian rule embracing contributory negligence of a plaintiff. Cases referred to.

5. **———: ———: Statute: Penalty: Compensation.** The statute (Sec. 5425, R. S. 1909) is both penal and compensatory and it is not error against a defendant if an instruction fails to ask for a penalty in addition to compensation.

6. **———: General Instruction: Nondirection: Measure of Damages.** Nondirection in a civil case is not error, and if a plaintiff asks a general instruction on the measure of damages, which defendant thinks should specially set forth the elements and limitations of the damage, it is defendant's duty to ask an instruction to that effect, and if he does not do so he cannot complain of plaintiff's instruction.

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Appeal from Daviess Circuit Court.—*Hon. A. B. Davis,* Judge.

AFFIRMED.

Paul E. Walker, E. M. Harber and *M. A. Low* for appellant.

H. L. Eads and *A. G. Knight* for respondent.

ELLISON, J.—Plaintiff is the widow of George H. Waite, who was killed by one of defendant's freight trains on one of its tracks at its station grounds in the town of Jamesport, Daviess county. Claiming that his death was caused by the negligence of defendant's servants, she brought this action for damages and prevailed in the trail court.

Jamesport is a town containing several hundred people, with defendant's railway station, grounds and tracks about dividing the business part on the north from the residence portion on the south. There are three tracks on the south of the station building, the one next to the platform being the main track. A long switch or house track, leaving the main track 400 feet below the station and connecting again about the same distance above, runs north of the station, passing along parallel with and in three feet of the platform. A much-traveled street called Broadway connects the business and residence parts of the town and passes over these tracks near the west end of the depot platform. A person coming along Broadway from the business houses to the station, or beyond to the residences, could turn off the street proper some two hundred feet from the station house and cross diagonally over to it on open ground, or, as it was called by some of the witnesses, a common. Or such person could keep in Broadway until he got to the house track at

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the west end of the platform and then turn square to the left down the house track, stopping at any place along the platform, or going on beyond as he might desire.

A freight train came in from the east about ten o'clock a. m. It had some freight to be unloaded and there were three or more cars standing with others on the house track which were to be put into the train, and one car in the train to be left on the house track. While some of the crew were unloading the freight, the engineer and brakeman set about getting these standing cars off the house track. In doing it they took the engine and part of the train up to the west end of the house track, backed in on it down to where the standing cars were. Two or three trips back and forth were necessary for the work. On the last trip, in backing down they struck one or more cars standing on the house track at the Broadway crossing, pushing them thence on east along the side of the station platform, striking and killing deceased upon the track a little south of the west end of the station house.

The reason deceased came to be at this place was this: He lived near to but south of the track, and 200 feet or more east of the station. He had been over into the business part of the town with his bucket to procure some vegetables from the stores, and was returning homeward. He was an old man, somewhat deaf. He came south along Broadway until he came to the car blocking his way at the crossing. He then turned east and as he got around or beyond the end of the car, must have gotten onto the house track (the ties of which were covered with dirt, or at least were flush with it) to walk on down past the station house and platform in the direction of his house, or possibly he may have intended to get up on the platform and was struck before doing so.

There was evidence tending to show that while deceased, when he arrived at the crossing, was bound

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to have seen other cars than the one immediately in his way, yet on account of obstructions to his view, he could not have seen that there was an engine at the far end.

Plaintiff claims that the house track was used by the public, with the knowledge of defendant, as a way or means of getting to, beyond and from the station, and that therefore it was its duty to expect and look out for such persons when doing train work and use ordinary care to warn them of danger. That defendant's servants saw deceased's peril, or might have seen it by the exercise of ordinary care, in time to have saved his life by stopping the cars or warning him off the track. There was evidence in the case to sustain plaintiff's claim.

As stated, the house track and open ground were on the north of the station platform. Nearby were the business houses of the town. The house track was used by the defendant to load and unload freight cars standing thereon for that purpose. To do this, people and teams continuously crossed the common or open ground, and were necessarily about, over and around this track. One team was so engaged further along at the time deceased was killed. But, as stated above, there was evidence in plaintiff's behalf to show that the general public, local and transient, also used these grounds and the track as a passway, with defendant's knowledge. The station itself was in the midst of the town and adjoined the business portion. In such circumstances it was defendant's duty, when moving its cars, to keep a lookout for persons on the track. [Fearons v. Kansas City El. Ry. Co., 180 Mo. 208, 223; Eppstein v. Mo. Pac. Ry., 197 Mo. 720, 734; Hufft v. Railroad, 222 Mo. 286, 301; Ellis v. Met. St. Ry. Co., 234 Mo. 657, 673; Railroad Co. v. Cross, 58 Kan. 424.] In the first of these cases it is said that the law "demands such operatives to be on the alert, and to keep a lookout for the realization of the anticipation or ex-

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pected presence of the person." This duty, therefore, could not be performed by servants putting themselves in position where they could not see if any one was on the track.

In backing down to the crossing to couple onto the standing car or cars, the company's brakeman was on the end car and as the standing cars were approached he climbed down to see that a proper (automatic) coupling was made. After seeing that it was, he climbed back, but at no time, according to his statement, could he see the track ahead, for the reason that these cars to which he coupled were in the way. It was, at least, a question for the jury whether it was not negligence to thus strike and move these cars blindly, whether it was not the requirement of ordinary care, that some servant should have been at such a place as that he could know the way was clear. [Authorities above cited.]

We do not see any reasonable ground upon which to base a charge of contributory negligence, though that question was submitted to the jury. It could be said that deceased was turned into the course he took by defendant itself. For it blocked his way over the street crossing, not only on the house track, but a large part of its train stood over the crossing of the main track on the south side of the platform. While traveling upon the street he found his way barred by defendant. What more natural than that he should go around the obstruction, especially in the direction of his home? Whether he intended to step up onto the platform, or walk on the track further down the platform, is not known, but that he was put into the position by defendant there is no room for doubt. In such situation he was not a trespasser.

There is an old rule of law called *extra viam*, founded upon temporary necessity compelling persons to go out of the usual way, which bears relation to deceased's situation, at least by way of illustration.

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Thus if one traveling upon the highway find an insurmountable obstruction therein which blocks his further progress, he may turn into the adjoining field as a means of passing around and he will not be a trespasser. Private property is held subordinate to such emergency use by a person traveling on a *public* highway. [Campbell v. Race, 7 Cush. 408.] In Taylor v. Whitehead, 2 Doug. 745, Lord MANSFIELD said that highways "are for the public service, and if the usual tract (track) is impassable, it is for the general good that people should be entitled to pass in another line." In effect, this rule was applied in Brown v. Railroad Co., 50 Mo. 461, 467, where Judge WAGNER said: "The crossing was obstructed by the defendant's train, and the plaintiff, therefore, to pursue her journey, turned away and crossed at another place where people were accustomed to cross, but it does not appear that they had any license therefor. The defendant had the right to stop its train at the crossing for a reasonable time, but when the train did stop and obstructed the crossing for the purpose of unloading cars, as was the case here, were travelers always obliged to wait before they could continue their business, till the cars were unloaded? While the railroad company is the absolute owner of its track and has the right to its free and unmolested use, still it is not absolved from the exercise of ordinary care and diligence to prevent injury to others when they happen on the track under the circumstances in which the plaintiff was . . . placed. . . . In towns caution should always be used. . . . As the crossing was obstructed by the act of the defendant, and persons were in the habit of going over the private way, we think that the agents and servants of the defendant were bound to take notice of these facts, and use a precaution commensurate with them." It was applied in Smith v. Railway Co., 84 Ga. 698. If that be the rule where the obstruction was not caused by the adjoining proprietor, for the

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greater reason should it apply where such proprietor places the obstruction.

Now defendant did know, or should have known, that when it blocked a main travelled street in the town with its cars, persons would, in all probability, pass around; and it should have had a servant on the lookout from a position where he could see and thus avoid the danger which arose from its act. In this case the engineer's testimony shows that he moved the cars without being able to see the track at the other end, depending, as he properly might, upon signals from the brakeman. But the latter allowed the train to move down the track though he could not see who might be thereon. Of course, even in such circumstances, a person should not go heedlessly into impending danger; and on this phase of the case there was evidence tending to show that the engine and cars moved quietly and, as we have already stated, on account of obstructions to view, the engine could not be seen.

We have considered defendant's objections to instructions and do not think the criticisms made are of sufficient force to say that the jury was misled or misdirected. Certainly a reading of all of them, for either side, leaves one fully impressed that no misunderstanding as to the rights of the parties could result. Point is made that plaintiff is allowed to recover on either of two grounds, viz.: due care of deceased and negligence of defendant; and the humanitarian doctrine, consisting of contributory negligence of deceased with negligence of defendant after discovering his peril, or opportunity for discovering it. It is insisted that there are inconsistent theories, both of which should not be allowed to stand as a basis of recovery. Under the ruling of the Supreme Court in Spencer v. Railway Co., 222 Mo. 310, we think them not inconsistent. This question has been discussed by each of the Courts of Appeals, with the conclusion

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that the decision announced by the Supreme Court in the Spencer case is controlling. [Childress v. S. W. Ry. Co., 141 Mo. App. 667; Shipley v. Met. St. Ry. Co., 144 Mo. App. 7; Blyston-Spencer v. Railway Co., 152 Mo. App. 118; Kirchoff v. Railway Co., 155 Mo. App. 70.]

The instruction on the measure of damages was short and quite general. It limited the damages to compensation only, in a sum not less than two nor more than ten thousand dollars. In that respect it ought not to be complained of by defendant, since, as was decided in Boyd v. Railway Co., 236 Mo. 54, the statute is both penal and compensatory. That case fully discussed preceding cases and clearly sets forth the law.

That the instruction might have properly included specific elements and did not, is not reversible error in instances where defendant abides by it and asks none on that head. It is now the settled law in this State that nondirection, in a civil case, is not error; and that if the elements of damage are not set forth in a general instruction for plaintiff, it is defendant's right, if he so desires, to set them forth in an instruction for himself; and that if he fails to do so, he has no ground for complaint. [Browning v. Railway Co., 124 Mo. 55; Wheeler v. Bowles, 163 Mo. 398, 409; Geismann v. Electric Co., 173 Mo. 654, 679; Haymaker v. Adams, 61 Mo. App. 581.] Defendant has cited us many cases deciding what an instruction on the measure of damages may properly contain. But none of these make it compulsory that a plaintiff shall go beyond a general instruction and specify the different elements of limitation of damage.

There are other objections to the judgment, but a careful consideration of these has led us to the conclusion that they do not justify a reversal, and hence we affirm the judgment. All concur.

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UNIONVILLE PRODUCE COMPANY, Respondent, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 31, 1912.

1. **CARRIERS OF GOODS: Delayed Shipment: Jury Question.** In an action prosecuted by a shipper of perishable property to recover damages resulting from negligent delay in the transportation of the shipment, the defendant contended that a severe storm caused the delay in the yards of a connecting railroad, and hence there was no negligence on its part. *Held*, that the demurrer to the evidence was properly overruled, and the question of negligent delay was rightfully submitted to the jury.

2. ———: **Unusual Delay: Accidental Causes.** Proof of an unusual delay is not proof of negligence since such delays often result from accidental or unusual causes which reasonable care would not anticipate.

3. ———: ———: **Question for the Jury.** The fact of unusual delay with slight evidence of neglect will suffice to take to the jury the issue of whether the delay was negligent or excusable.

4. ———: **Acceptance of Freight: Notice of Delay.** The acceptance of a shipment of freight by a carrier without notice to the shipper that there may be delays, is equivalent to an assurance that it will be delivered in a reasonable time, except for the intervention of excusing causes of subsequent occurrence.

5. ———: **Instructions: Definitions.** When the defendant objects to an instruction of the plaintiff's concerning a definition of its negligence, it should be taken advantage of, by its own instruction.

Appeal from Putnam Circuit Court.—*Hon. Geo. W. Wanamaker*, Judge.

AFFIRMED.

O. M. Spencer, Palmer Trimble and *J. C. McKinley* for appellant.

N. A. Franklin for respondent.

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JOHNSON, J.—This is an action prosecuted by a shipper of perishable property to recover damages resulting from negligent delay in the transportation of the shipment. The cause pleaded in the petition and submitted to the jury is founded on a breach of defendant's common law duty. The answer in addition to a general denial pleads a written contract of affreightment which by its terms restricted defendant's liability to its own line and alleges that the negligent delay, if any, occurred on the line of a connecting carrier. A trial of the issues resulted in a verdict and judgment for plaintiff and the cause is here on the appeal of defendant.

In the afternoon of December 15, 1909, defendant received from plaintiff at Unionville, Mo., a carload of dressed poultry consigned to a firm of commission merchants in Philadelphia and undertook to transport the shipment to its destination via the Baltimore and Ohio Railroad. A shipping contract was entered into which called for a through shipment and imposed certain restrictions on defendant's common law liability, but we do not understand counsel for defendant as contending in their briefs that defendant should not be held liable for the injurious results of a negligent delay whether such negligence occurred on defendant's line which ended at Chicago or on the lines of the connecting carriers. Their main contention is that the evidence of plaintiff fails to show a negligent delay at any stage of the transportation and, therefore, that the court erred in sending the case to the jury. There is evidence tending to show that in the present instance two days were added to the time usually required for the transporation of such shipments. The car was run from Unionville to Chicago on schedule time and there was no unusual delay on the line of the Baltimore and Ohio Railroad Company. The lost time occurred at Chicago while the car was in the possession of the Belt Line Company. More than

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forty hours were consumed by that company in switching the car from the yards of defendant to those of the Baltimore and Ohio Company, a distance of eight miles. The evidence of plaintiff will support the inference that the delay was caused by the car "becoming lost" in the yards of the Belt Line. Contradictory of this evidence is the testimony of the traffic manager of that company, introduced as a witness by defendant, who testified that all railroad yards in Chicago had become congested on account of a severe storm and the delay was caused by that condition and not by any lack of care or effort on the part of his company. He states that "on the 12th and 13th of December it rained and sleeted, and this caused practically a solid cake of ice in the yards, and a good many of the cars were icebound and had to be picked out with picks before they could move them. This congested the yards and made it less accessible for handling the shipments; it was almost impossible to get up the trains and get them moving. That appeared not only in the yards of the Belt Railroad but all the yards." Further he said that five inches of snow fell on December 17 and three inches more between that day and the 19th.

The gravaman of plaintiff's cause of action is negligence and the burden is on plaintiff to prove not only an unusual delay in moving the car at Chicago but that such delay was negligent under all the circumstances of the case. Proof of an unusual delay is not proof of negligence since such delays often result from accidental or unusual causes which reasonable care would not anticipate. [Cunningham v. Railroad, 79 Mo. App. 524; Lay v. Railroad, 157 Mo. App. 467; Ecton v. Railroad, 125 Mo. App. 223.] But given the fact of an unusual delay, slight evidence of neglect will suffice to take to the jury the issue of whether the delay was negligent or excusable. [Holland v. Railroad, 139 Mo. App. 702; Gilbert v. Railroad, 132

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Mo. App. 697; Fruit Co. v. Railroad, 163 Mo. App. 427.]

If this car of valuable and perishable merchandise became lost in the yards of the Belt Line Company, such fact, if unexplained, would support an inference that the delay was due to negligence since railroad companies must systematize their business, and it would be a poor system indeed that would not keep track of important affairs of the business. If, on the other hand, the delay was due to extraordinary weather conditions which retarded the movement of cars and congested the terminal yards at Chicago while the shipment was there, such delay should not be regarded as due to negligence but to causes reasonable care would not anticipate and obviate. The argument of defendant that no negligence is shown, when fully analyzed, is found to rest on the verity of the traffic manager's testimony to the effect that an unavoidable congestion of the yards at Chicago was the cause of the delay. But our view of that evidence is that it merely raised an issue of fact for the jury to determine. We would not be justified in accepting it as conclusive in the face of facts and circumstances which point to negligence as the true cause of the delay and, therefore, contradict the testimony of the traffic manager. Moreover his version of the occurrence is marked by intrinsic defects the jury were entitled to consider and weigh. For example, if, as he states, the yards became congested on December 13 because of the sleet storm, and the movement of cars was brought to a practical standstill, the query of counsel for plaintiff becomes quite pertinent, Why did defendant two days later receive the shipment in controversy without notifying plaintiff of the existence of a condition at Chicago that would cause delay in the transportation? As we said in Russell v. Grain Company, 114 Mo. App. l. c. 496, the carrier is not expected to perform the impossible and may re-

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fuse to accept freight unless the shipper will agree to suffer delay in delivery, made necessary by extraordinary conditions. But the acceptance of a shipment without such stipulation or without notifying the shipper of the fact that it cannot be delivered promptly is equivalent to an assurance that it will be delivered in a reasonable time, except for the intervention of excusing causes of subsequent occurrence. And in such case the carrier would not be allowed to excuse a delay it knew at the time it accepted the shipment would be certain to occur.

The evidence, as a whole, presented the pleaded issue of defendant's negligence as one of fact for the jury to determine and the court did not err in overruling the demurrer to the evidence.

Point is made that the instructions given at the request of plaintiff did not properly define the negligence for which plaintiff was entitled to recover his resultant damages, but we think the instructions are sufficiently definitive. If defendant desired a more specific definition it should have requested it in its own instructions.

We deem the criticism of plaintiff's instruction on the measure of damages too hypercritical to call for specific notice. The case was fairly tried and the judgment is affirmed. All concur.

JOSEPH H. BORDERS, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 31, 1912.

1. **NEGLIGENCE: Humanitarian Rule: Electric Coupe.** This is an action to recover damages for the negligence of the defendant in causing its street car to run into an electric coupe driven by the plaintiff's daughter. She was driving south on the west side of Grand avenue and when she came to the intersec-

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tion of Grand avenue and Gillham road, she started to turn up Gillham road, and had about cleared the southbound track, when the car ran into the coupe, and wrecked it. *Held*, that the demurrer to the evidence was properly overruled, and that plaintiff was entitled to recover under the humanitarian rule.

2. ———: **Due Care: Jury Question.** It was a question for the jury to decide whether or not the motorman acted with due care under the facts and circumstances shown by the evidence.

3. ———: **Contributory Negligence: Defense.** Contributory negligence is not a defense to a cause founded on the humanitarian rule.

4. ———: **Affirmative Defense: Contributory Negligence: Issue of Fact.** Contributory negligence, being an affirmative defense, must be pleaded in the answer to raise an issue of fact for the jury to determine.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

AFFIRMED.

John H. Lucas and *Chas. N. Sadler* for appellant.

George L. Davis for respondent.

JOHNSON, J.—An electric coupe owned by plaintiff and driven by his daughter was wrecked in a collision with an electric street car operated by defendant and plaintiff sued to recover his damages on the ground that they were caused by negligence of defendant in the operation of the street car. The petition pleads that the driver of the coupe, its only occupant, while in the exercise of reasonable care, was induced to enter the sphere of danger by the negligence of the motorman in running the car at high and dangerous speed and in failing to give warning of its approach and also pleads negligence under what is known as the humanitarian or "last chance" rule. The answer under our ruling in Ramp v. Railroad, 133 Mo. App. 700, must be treated as presenting no other defense than a general denial. Verdict and

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judgment were for plaintiff in the sum of $667.50, and defendant appealed.

Plaintiff bought the coupe two or three months before the injury and paid $2500 for it. His daughter, a young woman, had become proficient in running it and was returning home from taking her father to his office. She traveled south on Grand avenue, a wide and much traveled thoroughfare, and her course was along the west side of the street until she came to the junction with Gillham road when she turned to a southeasterly course for the purpose of going on that road which is a boulevard and more desirable for motor cars than Grand avenue, a street used for all kinds of travel. There are two street car tracks on Grand avenue, the west track being used for southbound cars. The young woman took a diagonal course to cross the tracks and had almost cleared the first one when a southbound street car collided with the rear end of the coupe and wrecked it. Fortunately she escaped injury but plaintiff was put to an expense of $667.50 for repairs on the coupe.

The driver states that when first she turned to cross the tracks she looked back out of the side window to a point on the track, afterwards found to be 170 feet from the place of collision, and the car was not in sight. Assuming she had a clear course and the pavement over the tracks being a little rough she threw on the first speed (the slowest) and crossed at a speed of not over four miles per hour. The bell of the car was not rung and she did not know of its approach before the collision. The distance traveled by the coupe from the place she started to cross and looked back, to the place of collision was forty-two feet. This testimony tends to show that the street car traveled more than 170 feet while the coupe, going at four miles per hour traversed forty-two feet, and supports a reasonable inference that the speed of the street car was from sixteen to twenty miles per hour.

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The driver admits the view rearward was unobstructed and that by looking back out of the rear window of the coupe she could have seen the car, but she thought the view afforded by the side window was all the demands of safety required and did not make the additional effort.

The defendant introduced no evidence.

In the consideration of the questions raised by counsel for defendant in their argument on the demurrer to the evidence which they insist should have been given, we shall assume as proved the following facts we find abundantly supported by evidence. First, that when the coupe first turned to cross the tracks the street car was more than 170 feet away and was approaching at a speed of sixteen to twenty miles per hour; second, that the intention of the driver of the coupe to cross ahead of the car must have been apparent to the motorman at that time; third, that he had ample opportunity to avoid a collision either by reducing speed or by giving warning signals which, if given, would have enabled the driver of the coupe to cross in safety by accelerating its speed and, fourth, that the motorman, supposing the coupe had time to cross, failed to put forth any effort to avert the collision.

In the instructions given at the request of plaintiff, the theory that the young woman was in the exercise of reasonable care appears to have been abandoned by plaintiff and his right to a recovery is predicated solely upon the negligence under the last chance rule. We shall not discuss abandoned issues and, assuming for argument that the evidence of plaintiff accuses her of negligence in law which contributed to place her and her vehicle in the path of danger, the facts we have stated convict the motorman of negligence under the last chance rule that must be considered as the sole proximate cause of the injury. In such view the negligent acts that brought the perilous situation

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into being must be relegated to the field of remote causes. With a clear view ahead and having before his eyes the clearly manifested purpose of the driver of the coupe to cross ahead of the car, it is charitable to the motorman to say that he conducted himself on the erroneous supposition that the coupe had time to clear the track. A reasonably careful and prudent man in such situation would not speculate with the safety of another—would not act on nice calculations, when he had an ample margin of safety to go on. It was for the jury to say whether or not the motorman acted with due care under the circumstances of the situation. The case is similar in principle to that of Flack v. Railroad, 162 Mo. App. 650, and we refer to that opinion and to the cases therein cited as sustaining our conclusion that the demurrer to the evidence was properly overruled.

The criticism offered by defendant to plaintiff's first instruction is based on the erroneous view that the negligence submitted was not a breach of the humanitarian duty of the motorman. Contributory negligence is not a defense to a cause founded on the last chance rule. Furthermore contributory negligence being an affirmative defense must be pleaded in the answer to raise an issue of fact for the jury to determine and the answer before us contains no such plea.

The objections to certain rulings of the court on evidence are pronounced not well taken. The case was tried without prejudicial error and we shall not reverse a judgment for errors that clearly were harmless.

The judgment is affirmed. All concur.

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G. H. HAAKE, Respondent, v. G. H. DULLE MILLING COMPANY, Appellant.

Kansas City Court of Appeals, December 31, 1912.

1. **NEGLIGENCE: Instructions. Misconduct of Counsel.** Plaintiff sued for damages for personal injuries received while oiling the defendant's machinery. The evidence showed that plaintiff had to climb a ladder and pass one arm through a belt, which had been spliced and at one place was worn and frayed. The roughened and frayed edges of this belt caught on his sleeve and he was jerked over the pulley and was severely injured. Plaintiff's instruction regarding medical expenses incurred was not limited as in his petition and the inflammatory remarks of plaintiff's counsel during the argument were unrebuked. It is held that both of these matters constituted reversible error.

2. ———: **Damages: Instructions.** A party is bound by the limits he places in his petition regarding the element of his damages and an instruction is erroneous and prejudicial in ignoring this restriction and enlarging the scope of the recoverable damages. This error cannot be cured by a remittitur because the influence that this error had on the jury cannot be determined.

3. **COURTS, DUTY OF: Misconduct of Counsel: Impassioned and Extrinsic Eloquence.** It is the duty of the court to keep impassioned oratory within the limits of the record and not to allow a party to be injured in his rights by his adversary's extrinsic and passionate eloquence.

Appeal from Cole Circuit Court.—*Hon. John M. Williams,* Judge.

REVERSED AND REMANDED.

Watts, Gentry & Lee for appellant.

W. C. Irwin and *D. F. Calfee* for respondent.

JOHNSON, J.—This is a personal injury suit. Plaintiff had been employed thirty-five years as a laborer in a mill operated by defendant at Jefferson City and was injured when engaged in oiling machin-

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ery, a task he was required to perform while the machinery was running. He had to ascend a ladder and extend his hand and arm between a moving belt and pulley wheel in order to oil one of the bearings, the oil hole of which could not be seen from his position (which was the only position he could take) and could be found and filled with oil only by use of the tactile sense. The belt had been spliced and at one of such places had become worn and frayed. While oiling this bearing plaintiff's arm necessarily was in close proximity to the belt which was moving rapidly and the roughened and frayed edges of the defective splice caught his sleeve and he was jerked over the pulley wheel and severely injured. His evidence tends to show that he was performing his task in the usual manner and was exercising due care. The specifications of negligence in the petition which find support in the evidence of plaintiff are, first, the failure of defendant to provide a suitable oil can, i. e., a can with a long spout; second, the failure to equip the bearing with an oil-conducting tube that would permit the introduction of the oil without the insertion of the servant's arm in a dangerous place; third, operating a belt which had a defective and dangerous splice and, fourth, the omission to enclose the moving parts of the machinery with a suitable guard.

The answer contains a general denial and pleas of assumed risk and contributory negligence. A trial of the issues resulted in a verdict and judgment for plaintiff in the sum of six thousand dollars and the cause is before us on the appeal of defendant.

The errors assigned by counsel for defendant relate to the rulings of the court in giving instructions numbered 1, 2 and 6, asked by plaintiff and to the alleged misconduct of counsel for plaintiff in the examination of witnesses and in the closing argument to the jury.

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The objection to instructions numbered 1 and 2 is that they direct a verdict for plaintiff without requiring the jury to find that the acts of defendant included in their hypothesis were negligently performed or rendered unsafe and dangerous the place where plaintiff was required to work. We rule this point against defendant. The facts the instructions required the jury to find were such as to leave no room for a reasonable difference of opinion respecting the conclusion to be drawn from them. They were wholly incompatible with the inference of reasonable care on the part of defendant, and justified the court in telling the jury that, in effect, such facts would be conclusive proof of defendant's negligence. There was no need to require the jury to declare an act negligent which the law itself would pronounce negligent. [Tarwater v. Railroad, 42 Mo. 193; Yarnall v. St. Louis Railway Co., 75 Mo. 575; Farris v. Railway, 80 Mo. l. c. 329; Keown v. Railway, 141 Mo. 86; Kelley v. Parker-Washington Co., 107 Mo. App. 490; Gessley v. Railway, 26 Mo. App. 156; Zimmerman v. Railway, 71 Mo. 476.]

The sixth instruction given at the request of plaintiff related to the measure of damages and directed the jury to allow him damages for "his necessary expenses for medical attention in endeavoring to be cured" without placing any limit on such allowance or confining it to expenses incurred for medical attention received before the filing of the suit. The petition expressly restricted such damages to $175 in amount and to medical attention received before the institution of the suit. Plaintiff is permanently injured and his evidence tends to support the inference that his expenses for medical services which he has incurred, and with reasonable certainty will incur in the future, on account of his injury are an indefinite amount greatly in excess of that stated in the petition.

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Plaintiff is bound by the limits he placed in his petition on this element of his damages and the instruction was erroneous and prejudicial in ignoring this restriction and enlarging the scope of the recoverable damages. [Radtke v. Basket Co., 229 Mo. 1, and cases cited.] The error cannot be cured by remittitur for the reason that the record affords no means for ascertaining the extent of the influence the error had on the minds of the jury.

Defendant complains of misconduct on the part of counsel for plaintiff in persisting in asking leading questions of his witnesses but we find the court sustained the proper objections of defendant to such questions and, as the record shows defendant was content with these rulings at the time they were made, no issue of misconduct on that ground is before us.

But we find the court failed to give proper heed to defendant's objections to improper and highly inflammatory remarks made by counsel for plaintiff in the closing argument to the jury on the subject of the measure of damages. In the course of his argument to the jury counsel said, "How many of you, gentlemen of the jury, would have your arm torn from your body for ten thousand dollars?" And when defendant objected, counsel withdrew the remark. The court, at the request of defendant, told the jury the remark was withdrawn and admonished the speaker to keep within the record. Immediately he repeated the same thought in a slightly different manner and on being again warned by the court to keep within the record, exclaimed that he would do "anything on earth to please this man" referring to the objector, and then, as a climax, said the same thing over again in a more impressive way. This time the court overruled defendant's objection and said the remark was not improper. Defendant excepted to the ruling and has preserved his exception in the record.

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The impropriety of the argument is apparent. Of course no man would have his arm torn from his body for ten thousand dollars, or for ten times that sum, but the law does not recognize the abhorrence to dismemberment and disfigurement implanted by nature in every human breast as a thing that should influence the assessment of damages in personal injury cases. The only purpose the speaker had or could have had in making such an argument was to arouse the sympathy and inflame the passions of the jury and coin those emotions into dollars. The rulings of the court, on the whole, merely afforded an opportunity to the speaker to emphasize and aggravate the error. He came out with flying colors before the jury when he should have been most sternly reprimanded. Due allowance must be made for fervor in advocacy but it is the duty of the court to keep impassioned oratory within the limits of the record and not to allow a party to be injured in his rights by his adversary's extrinsic and passionate eloquence. For the errors noted the judgment is reversed and the cause remanded. All concur.

CHARLES WEISHAR, Respondent, v. JOHN L. SHERIDAN, Admr. et al., Appellants.

Kansas City Court of Appeals, December 31, 1912.

1. **INJUNCTIONS: Surface Water: Demurrer.** Plaintiff sued the defendants for unlawfully and maliciously collecting surface water from their lands and precipitating it in a body on the land of the plaintiff and to enjoin them from doing so in the future. A permanent injunction was granted and damages awarded. *Held*, that the demurrer to the evidence was properly overruled and a proper judgment rendered.

2. ———: ———: **Dominant and Servient Proprietors.** Surface water is a common enemy against which every landowner

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must protect himself and a servient proprietor has no right to require protection at the hand of the dominant proprietor, but the dominant proprietor has no right to collect the excess surface water and cast it in a body on the servient land.

Appeal from Adair Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

AFFIRMED.

Higbee & Mills and *A. Doneghy* for appellants.

F. H. McCullough for respondent.

JOHNSON, J.—This action was commenced in Knox county but a change of venue was granted and it was sent to Adair county where it was tried and a judgment rendered for plaintiff. The parties are neighboring farmers in Knox county and the cause of action pleaded in the petition is the alleged unlawful and malicious act of defendants in collecting surface water from their land and precipitating it in a body on the land of plaintiff to his injury and damage. The prayer of the petition is for the recovery of both compensatory and punitive damages and for a writ of injunction to restrain defendants from continuing the nuisance. The issues relating to the cause at law were tried to a jury and a verdict was returned in favor of plaintiff which assessed compensatory damages at $126.25 and punitive damages at one dollar.

The issues pertaining to the prayer for equitable relief were tried by the court and a permanent injunction was issued in conformity to the prayer. The court made and filed findings of fact which, being well supported by evidence, we have used in the preparation of our statement of the facts of the case.

The scene of the events that gave rise to the present controversy was at the intersection of two public roads in Knox county. One an east and west road we

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shall call the Edina road and the other a north and south road called the Sheridan road which came from the north and ended at its intersection with the Edina road. Defendants owned a large farm on the north side of the Edina road and this farm was bisected by the Sheridan road. They also owned the farm south of the Edina road and immediately west of plaintiff's farm which consisted of forty-five acres of land east of the line that would have marked the east side of the Sheridan road had it been extended south. The natural drainage of all this land was towards the southeast, and plaintiff's land, before the establishment of the public roads and the drainage ditch we shall describe, was servient to defendants' land and received its surplus surface water. A natural watercourse coming from the northwest crossed the Edina road at a point some distance west of the road intersection, curved to an eastward course and flowed across the lands south of the Edina road to a point near the east side of plaintiff's farm and then, turning towards the northeast, again crossed the Edina road. Plaintiff's house and well were between this watercourse and the Edina road. When that road was established a drainage ditch was dug along its north side and the surface waters from defendants' land north of the road were carried by that ditch and emptied into the watercourse at the place of the second crossing. Afterward when the Sheridan road was established, a culvert was put in at the ditch crossing. Before the roads and ditch were built, surface water coming from the higher land of defendants passed over a natural depression in plaintiff's land in a southeasterly course and emptied into the natural watercourse. The drainage of such water through the ditch relieved the land of plaintiff from this servitude and opened to cultivation the land in the depression which had been too marshy for successful tillage. This method of drainage had been continned during a pe-

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riod of more than fifteen years when defendants, in October, 1907, without permission from the constituted authorities, entered upon the public roads, tore out the culvert across the Sheridan road, filled up the ditch at that place and put in a culvert across the Edina road in line with the west side of the Sheridan road. The result of this change was to divert the flow of the surface water collected by the ditch from defendants' land west of the Sheridan road to a course across the Edina road and thence eastward to the depression on plaintiff's farm. The land in the depression again was made unfit for cultivation and the well was polluted and its usefulness destroyed. In October, 1908, plaintiff, with permission of the authorities, took out the culvert across the Edina road and replaced the one crossing the Sheridan road, but defendants immediately destroyed his work and restored their own. This suit followed. Defendants attempted to justify their violent conduct with the excuse that the ditch on the north side of the Edina road was a menace to their fences, but the court found, we think properly, that they were prompted not by the motive of protecting their own property but by ill will and malice towards plaintiff.

We think the court did not err in overruling defendants' demurrer to the evidence. We give full recognition to the rule that surface water is a common enemy against which every landowner must protect himself and that a servient proprietor has no right to require protection at the hand of the dominant proprietor, but that rule never has been applied in a manner to allow a dominant proprietor to collect the excess surface water from his own land and cast it in a body on the servient land. Defendants not only did that very thing but without even a pretense of lawful authority for so doing, wilfully destroyed a public drainage ditch obviously designed and used for the benefit of their own lands as well as those of plaintiff.

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It is useless to try to justify such conduct and no useful purpose would be served by a discussion of the many questions of law argued in the briefs. The demurrer to the evidence was properly overruled.

The petition states a good cause of action, the rulings on the evidence and the instructions to the jury are free from prejudicial error. The judgment is affirmed. All concur.

MARY GRAHAM, Respondent, v. MARY WILSON et al., Appellants.

Kansas City Court of Appeals, December 31, 1912.

1. **EQUITY: Trust Funds: Husband and Wife: Incumbrances.** This is an action in equity brought by the plaintiff to establish a resulting trust in land belonging to her husband at the time of his death. The plaintiff, at the time of her marriage, was a widow with three children, the husband was a widower with four children. The husband took $500 of plaintiff's money to pay for a new house, and $400 to pay off the incumbrances on the farm. The trial court found each of these advancements created a trust by operation of law. It is *held* that the court erred in declaring a trust for the $500 used to pay for the house, but a trust was properly declared for the $400 with which the husband paid off the incumbrances on the land.

2. **WITNESSES: Evidence: Contracts.** In actions where one of the original parties is dead, the other party to such a contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party claiming under him. Sec. 6354, R. S. 1909.

3. **EQUITY: Trust Fund: Resulting Trust.** When the husband without the consent of his wife in writing appropriates her separate estate and uses it for the betterment of his own land, he commits a wrong against his wife, for which the law affords her redress and treats him as a trustee *ex maleficio*. She can follow that money and have it charged, in equity, as a lien upon the land. Thus she becomes the beneficiary of an implied or resulting trust by operation of law, and not by contract.

4. **STATUTE OF LIMITATIONS: Married Woman.** Under Sec. 1879, R. S. 1909, the twenty-four year Statute of Limitations begins to run as soon as the cause of action becomes complete whether the party is covert or discovert.

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5. ———: **Trusts: Expressed and Resulting.** As to an expressed trust the Statute of Limitations does not begin to run until the trust is denied, but as to trusts arising by operation of law the statute begins to run from the date of the discovery by the *cestui que trust* of the facts constituting the trust.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick,* Judge.

REVERSED AND REMANDED (*with directions*).

John A. Connett for appellants.

Sterling P. Reynolds for respondent.

JOHNSON, J.—This is an action in equity begun July 7, 1909, by plaintiff, the widow of John G. Graham, deceased, to enforce a lien against certain lands in Buchanan county belonging to her husband at the time of his death which occurred July 1, 1909. Two of the defendants, Florence Parrott and Rhody Graham, were children of plaintiff and her deceased husband, and four of the defendants, viz.: Mary Wilson (intermarried with defendant Bennett Wilson) John Graham, Lucien Graham and William Graham, were children of John G. Graham by a former wife. The children of plaintiff are not contesting the action and the controversy we are called upon to settle is between plaintiff and her stepchildren.

Plaintiff and Graham were married in March, 1882, and immediately made their home on a farm of eighty acres owned by the husband in Buchanan county. He was a widower with four children and plaintiff was a widow with three children. All of the children were minors and were reared as one family on the little farm. Graham had been living there with his children and had been having a bitter struggle with poverty. The improvements on the place were poor, especially the dwelling house and the farm was incumbered by two liens securing debts owned by Gra-

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ham aggregating $400. Plaintiff at the time of her marriage had money and notes of the value of about $2000 which were her separate estate and the charge in the petition is that her husband at divers times obtained possession of her money without her consent in writing and used it in discharging the two liens just mentioned and in building a new house and making other improvements on the farm. The prayer of the petition is "that an accounting be taken of the money and property received by said John G. Graham belonging to plaintiff and judgment rendered for plaintiff for the amount due her, and that the same be declared a lien upon the above described real estate," etc.

The answer contains a general denial and a plea that the action is barred by the Statute of Limitations and in a cross-bill defendants seek to have plaintiff's dower and homestead in the land set off as provided by statute.

After hearing the evidence offered by the respective parties the court granted the prayer of the petition, adjudged that the deceased husband of plaintiff had procured from her, without her consent in writing, the sum of $900 which he had used in paying off the incumbrances and in the improvement of the farm and decreed a foreclosure of the lien he adjudged had inured to plaintiff. He refused to grant the relief prayed by defendants in their cross-petition. Defendants appealed.

In the findings of fact made by the court it was found that in 1883 and 1884 Graham procured $500 from plaintiff to pay the cost of a new house he built on the farm, that in 1886 he obtained $200 which he used in paying off one of the incumbrances and in 1889 he obtained $200 more and with it paid off the other incumbrance. These amounts make up the sum for which the court decreed plaintiff was entitled to a lien. The first point argued by defendants is that

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plaintiff was not a competent witness and that the court erred in allowing her to give testimony over the objection of defendants. Counsel rest this point solely on the provision of section 6354, Revised Statutes 1909, "that in actions where one of the original parties to the contract is dead . . . the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party claiming under him."

The cause of action asserted by plaintiff does not arise from any contract or contractual relation between her and her husband. If without her consent in writing he appropriated her separate estate and used it in the betterment of his own land, he committed a wrong against his wife for which the law afforded her redress and, treating him as a trustee *ex maleficio,* she could follow her money and have it charged in equity as a lien upon the land. The wrongful act or acts of her husband put her in the position of the beneficiary of an implied or resulting trust created by operation of law and not by contract.

Not being a party to a contract with a deceased person the statute just quoted did not disqualify her as a witness unless it should be found that she is a party to "the cause of action" within the meaning of that term as used in the statute.

In support of his contention that plaintiff was such party and, therefore, incompetent as a witness, counsel for defendants cite us to the following cases: Lins v. Lenhardt, 127 Mo. l. c. 289-290; Curd v. Brown, 148 Mo. l. c. 95; Miller v. Slupsky, 158 Mo. 643.

In the first of these cases the point of the incompetency of the witness was not raised in the briefs but the court mentioned it "lest it be thought that, in passing over it in silence, we have given our sanction to such evidence as admissible," and held the witness incompetent on the ground that "the transactions between her husband and herself amounted to 'the con-

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tract or cause of action in issue and on trial' in this case, and he being dead, and she being 'the other party' to that 'contract or cause of action' was incompetent to 'testify in her own favor' as to transactions between them."

In the case of Curd v. Brown, a husband sued the heirs of his deceased wife to impress certain real estate with a trust, on the ground that it had been paid for almost entirely by his money but deeded to his deceased wife. Held, he was incompetent as a witness for any purpose "because the other party to the contract was dead." We do not regard this decision as pertinent to the questions under consideration for the reason that the trust, if any, created in favor of the husband, was founded on contract—on the implied promise of the wife to hold the title for her husband's benefit, while in the present case, as we have said, the cause of action did not inure to plaintiff in virtue of any implied promise of her husband but by operation of law, since he had appropriated her separate estate in a manner violative of the laws for the protection of married women.

The remaining case cited by defendants (Miller v. Slupsky, supra) clearly is in point. The heirs of a deceased married woman sued her surviving husband to divest him of title to real estate on the ground that her separate means were used by the husband in the payment of the purchase price of the land. The defendant husband was allowed to testify that he used his own money in paying for the property and the court held this ruling to be erroneous. We quote from the opinion (l. c. 646):

"The plaintiffs' cause of action is derivative. They, as heirs, were asserting a cause of action which Sophia Slupsky is alleged to have had against Abraham Slupsky in her lifetime, she being the one party to that cause of action and he the other, and she being dead he was incompetent to testify in the action.

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[R. S. 1889, section 8918; Lins v. Lenhardt, 127 Mo. 271; Messimer v. McCray, 113 Mo. 382; Meier v. Thieman, 90 Mo. 433.] As was said in the last case cited: 'The language of the statute is 'the other party,' i. e., the other original party to the contract or cause of action, shall not be admitted to testify in his own favor, when death has precluded the other *original party* from an equal opportunity. Whether party to the record or not, makes no difference as to the statutory incompetency of the witness; he is prohibited from testifying in his own favor in any case whatsoever when the other original party to the contract or cause of action in issue and on trial is dead.' ''

In that case, as in the one before us, the cause of action was not founded on contract, and in holding that the surviving spouse was not a competent witness, the Supreme Court must have entertained the view that the term "cause of action" as employed in the statute is not restricted to a cause arising on contract but to any cause of whatsoever origin the surviving spouse may have against the estate of his or her deceased wife or husband.

On the other hand we are cited by counsel for plaintiff to the following cases: Freeland v. Williamson, 220 Mo. 217; McKee v. Downing, 224 Mo. 115. In the Freeland case the father of a married woman sent money to a third person to buy a farm for her. By mistake the agent had the title conveyed to her husband of which fact she remained ignorant until after her husband's death. She brought suit in equity to recover the land on the theory that a resulting trust had been created in her favor. She was allowed to testify and the Supreme Court approved the ruling of the trial court, saying, in part: "She did not testify as to any contract with her husband. Her right to the land was not derived through any contract between her and her husband, but depended upon the payment of the money for the land in question by her father for

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her benefit, under an agreement between her father, Andrew Miller, and John Spencer, to which arrangement her husband was not a party. We think she was clearly a competent witness in her own behalf."

In that case the resulting trust did not spring from the act of the husband in appropriating his wife's separate estate without her written consent but from the fact that he received and held title to land intended by her father as a gift to her. She was the beneficiary of a trust created through the improper performance by the agent of a contract her father had made for her benefit. But in accepting a title to a gift he knew was intended for his wife and in concealing the mistake from her, the husband, in effect, appropriated her separate estate in violation of her statutory rights and a cause of action against him inured to her at the moment of his misappropriation. Had he been alive when she discovered the mistake she could have maintained an action for the recovery of the land and such cause would have been founded, not on contract with her husband express or implied, but upon his wrong in appropriating her separate property to his own use. In equity the gift from her father became a part of her separate estate on the conveyance of the land by his vendor and the mistake in the conveyance was without effect on her equitable title. The cause of action, therefore, was the same in character as the one in hand and the decision holding, in effect that the wife is a competent witness in a cause not founded on a contract with her husband is not in harmony with the case of Miller v. Slupsky, supra.

In McKee v. Downing, the heirs of a deceased married woman sued her surviving husband to recover land bought with her money but conveyed to the husband. One of the questions, i. e., the competency of plaintiffs as witnesses, is fully discussed in the opinion and in the course of the discussion the precise

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question before us is touched upon in a manner expressive of approval of the rule applied in the Freeland case. An effort is made to reconcile this rule with that announced in the Slupsky case. Speaking for myself alone I do not think the distinction drawn between the two decisions affords any logical ground on which they may be harmonized. It is a distinction without a difference, but, however that may be, the important fact is that the Supreme Court unequivocally reaffirmed the doctrine of the Freeland case, holding, in effect, that in a cause of action such as the present which arises not from any contract, express or implied, between husband and wife, the wife, despoiled of her separate property by her husband, may give testimony in an action for the recovery of her property whether her husband be living or dead.

It is said in the opinion "the act of defendant, in using her individual property to buy land and in taking the title in his own name, was a fraud and the purpose of this suit is to make him restore what he had fraudulently deprived her of. No contract is in issue in this case." And on the theory that the cause is one sounding in tort the court reaches the conclusion that it does not fall within the operation of the statutory term "the other party to such contract or cause of action," as that term is intended to be understood. No error was committed in allowing plaintiff to testify, and with her testimony we think her evidence satisfies the rule invoked by defendants that in actions to establish and enforce a trust arising by operation of law, i. e., an implied or resulting trust, the court would not be justified in declaring the trust upon doubtful evidence or upon a mere preponderance of evidence but must have as a foundation for such declaration, evidence so clear, cogent and convincing that it leaves no room for a reasonable doubt of the existence of facts, which, of themselves, would imply a

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trust by operation of law. [Johnson v. Quarles, 46 Mo. 423; Curd v. Brown, supra; Burdett v. May, 100 Mo. l. c. 16; Bunel v. Nester, 203 Mo. 429; McKee v. Downing, supra.]

We think the evidence as a whole is convincing that the money with which the husband of plaintiff built the new house and discharged the incumbrances on his farm was procured by him from plaintiff without her written consent and from those facts we conclude, as did the learned chancellor, that each of these advancements created a trust by operation of law of which plaintiff was the *cestui que trust* and her husband the trustee and that since the proceeds of the trust were used in the betterment of the husband's title and estate in the land, they became a charge or lien against the land which plaintiff had a right to have enforced in an equitable action instituted for that purpose within the time prescribed by law. This brings us to the consideration of the defense that the action is barred by the Statute of Limitations.

Plaintiff was under coverture until July 1, 1909, and during that period her cause of action remained unaffected by the provisions of section 1879, Revised Statutes 1909. As soon as her cause of action arose she had the right to sue her husband even during coverture but she was not compelled to sue in order to avoid the bar of the statute (section 1879) until after she became discovert. But under the proviso to section 1881 the twenty-four year statute began to run against her as soon as her cause of action became complete, and whether covert or discovert, that statute would bar her action if it were not brought within the period of twenty-four years.

As to an express trust the Statute of Limitations does not begin to run until the trust is denied but as to trusts arising by operation of law the statute be-

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gins to run from the date of the discovery by the *cestui que trust* of the facts constituting the trust. [Burdett v. May, supra, l. c. 18; Reed v. Painter, 145 Mo. 341; McKee v. Downing, supra.] In the present case the facts constituting the resulting trust were known to plaintiff as soon as they occurred and the twenty-four year statute began running as to each of the advancements in question from the dates of their procurement by her husband. The money to build the house was obtained in 1883 and 1884, more than twenty-four years before the bringing of this action which immediately followed the discoverture of plaintiff. The action so far as it relates to the enforcement of the trust created by that advancement was barred by limitation. The advancements to pay off the incumbrances on the farm made in 1886 and 1889 being within the twenty-four year period were not barred nor was plaintiff guilty of laches in not bringing suit while covert and during the currency of that period. Being a married woman she had a right to give considerations of marital peace and concord precedence over property rights. "Mere ability to sue does not impose an obligation to do so." [Lindell v. Lindell, 142 Mo. l. c. 76.] And but for the restriction on the exercise of her rights imposed by the twenty-four year statute she would not have been compelled to sue until she became discovert no matter how great the lapse of time from the date of the origin of her cause of action.

Our conclusion is that the learned trial judge erred in declaring and enforcing a trust constituted by the advancement to build the house, and that he properly declared a trust on account of the advancements to discharge the incumbrances.

The point of defendants relating to the ruling on the cross-bill is not well taken. The cause asserted thereon was neither defensive nor in any other way

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germane to the cause pleaded in the petition. The judgment is reversed and the cause remanded with directions to enter judgment in accordance with the views expressed.

All concur.

ALBA LOGAN, Respondent, v. COURT OF HONOR, Appellant.

Kansas City Court of Appeals, December 31, 1912.

BENEFIT CERTIFICATE: Disease: Evidence: Peremptory Instruction. Though a trial court may, in proper instances, direct a verdict for the defendant, yet where the evidence sustaining the defense is of an uncertain or indefinite character, such as to the time when treatment was given for a disease, or as to the kind of disease, the court would be without right to so instruct and properly refused to do so.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb,* Judge.

AFFIRMED.

P. J. Reiger and *Jno. D. Taylor* for appellant.

John T. Barker for respondent.

ELLISON, J.—This action is based on a benefit certificate of life insurance on the life of A. W. Logan, who died in 1909. The judgment in the circuit court was for the plaintiff.

Plaintiff is the widow of deceased. The certificate was issued in 1907. The defense is that deceased was afflicted with syphilis and tuberculosis, for which he had been treated by physicians within five years of his application, whereas in answer to question set

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down in the application he stated and represented that he had not been treated for such diseases, nor had he consulted physicians within five years previous.

The point made by defendant is that it established its defense without meeting with any contradictory evidence.

There was evidence tending strongly to show that deceased had been treated by a physician for syphilitic trouble within five years of the date of deceased's membership. But this evidence, as given by the physician, shows he may have been mistaken in some material parts. There was evidence tending to show that he could not have treated deceased when he stated, and that his treatment may have been after deceased obtained his certificate. That he might have been mistaken was further shown by his having failed to mention such disease when he gave his deposition in the case on a former occasion. The other physician stated he was not certain whether deceased had been afflicted with syphilis.

In addition to this, plaintiff, who had been living with deceased as his wife, testified that he was not afflicted as contended by defendant.

We are satisfied that the uncertain nature of the testimony in defendant's behalf, to say nothing of that given by plaintiff, left the trial court without authority to direct a peremptory verdict for defendant, and it was right in refusing.

The judgment is affirmed. All concur.

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J. W. EDWARDS et al., Respondents, v. IRA S. SCHREIBER et al., Appellants.

Kansas City Court of Appeals, December 31, 1912.

1. **PERSONAL PROPERTY: Sale: Partners: Delivery.** Two partners owned a typewriting machine which was in their office. One sold it to his brother by executing a bill of sale, but the purchaser did not take possession at the time. He let it remain during the day of his purchase, all of next day, and until midnight of the next night, when he entered the office and took it away. But in the mean time, on the day preceding the night he took it away, the other partner sold it to another and gave him possession by giving him the key to the room, the purchaser locking it up. It was *held* that there was no delivery and change of possession to the first purchaser, and that there was such delivery and change of possession to the second purchaser; and that the first purchaser was liable to the second for the value of the machine.

2. **———: ———: Change of Possession: Delivery of Key.** Where there is an article of personal property in a room and it is sold to a purchaser, the delivery of the key to the room and the purchaser assuming control by locking it up, is a sufficient delivery and change of possession to satisfy the statute.

3. **———: ———: ———: Bill of Sale: Fraudulent Conveyances: Statute.** The mere execution of a bill of sale for an article of personal property which is at hand and capable of being taken bodily, is not such a delivery and change of possession as required by the statute for a valid sale.

4. **———: ———: Instruction: Matters Conceded: Reversible Error.** It is not reversible error to omit in an instruction matters which are admitted, or conceded, or about which no question is made.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

AFFIRMED.

Fulkerson & Fulkerson and *R. S. Newcomer* for appellants.

Culver, Phillip & Spencer for respondents.

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ELLISON, J.—This action is for the value of a typewriter, and was begun before a justice of the peace. On appeal to the circuit court the plaintiff prevailed.

It appears that T. P. Gordon and Ira Schreiber were partners under the firm name of the St. Joseph Hay & Feed Company. They were negotiating for dissolution on the 6th of February, 1911. On the next day Gordon sold the typewriter and other property in their office to plaintiffs and turned over possession by delivering to them the key, with which they locked up the office.

Defendants' claim is that Ira Schreiber sold the property to his brother Ernest the day before Gordon made the sale to plaintiffs, and the evidence does show a prior sale, but fails to show any delivery. The only legitimate delivery was made to plaintiffs at the time of their purchase. The evidence makes this clear. Defendant Ernest Schreiber testified that the property was delivered to him, but explained that he meant the bill of sale was delivered to him. He conceded the machine remained as it was; and though he could have immediately removed it, he allowed it to remain there the day he bought it and the next day, and that he went into the office about midnight the following night and took it out.

It thus appears that the sale to defendant Ernest Schreiber was not accompanied by a change and delivery of possession as required by the statute, and it was therefore a fraudulent sale as to plaintiffs. [Sec. 2887, R. S. Mo. 1909; Wright v. McCormick, 67 Mo. 426; State ex rel. v. Goetz, 131 Mo. 675.]

On the other hand, the purchase from Gordon was accompanied by a delivery and change of possession. The delivery of the key to the room, the purchaser assuming control by locking it up, was sufficient.

There was no error in the instruction for plaintiffs. The evidence, connected with the face of the

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entire record, left no issue which could be decided for defendants, unless it be that plaintiff did not make the purchase, and that question was submitted. It is not reversible error to omit in an instruction matters which are admitted or conceded or about which no question is made.

In the sale of personal property like that in question, where it was at hand and could readily have been delivered over to the purchaser, the mere execution of a bill of sale does not constitute such delivery and change of possession as required by the statute.

We do not think the point made as to plaintiffs suing upon one cause of action and being allowed to recover on another, is well taken. Formal pleadings are not necessary before a justice. The judgment being manifestly for the right party, is affirmed. All concur.

W. A. NEWTON, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **APPEAL: Absence of Motion.** Appeal may be taken without motion for new trial or in arrest. In such case the appellate court will examine the record proper but will consider only errors fatal to the action or to the judgment. Mere formal defects, though patent of record, will not be considered.

2. **JUDGMENTS: Verdict.** Judgment is not rendered until the verdict is received and recorded, and the judgment is based on the verdict *as recorded*. Hence judgment must follow recorded verdict and if that be ambiguous, the judgment cannot stand.

3. **VERDICTS: Reception of.** The only safe way to correct ambiguity in a verdict is for the trial court to have it done before the verdict is received, much safer than to receive it with an ambiguity and then attempt by construction to arrive at the intention of the jury after it has been discharged.

Appeal from Vernon Circuit Court.—*Hon. B. G. Thurman*, Judge.

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REVERSED AND REMANDED.

W. F. Evans, W. J. Orr, H. C. Clark, H. D. Green and *J. H. Orr* for appellant.

Scott & Bowker, M. T. January and *Dooley & Hiett* for respondent.

TRIMBLE, J.—Appeal from a judgment for thirty-five hundred dollars based upon the verdict of a jury in words and figures, as follows: "We the jury find the issues for the plaintiff and assess his damages at the sum of thirty-five (3500) dollars." The appeal was taken and allowed solely on the record proper. No bill of exceptions was filed to preserve matters outside of the record, hence the case is here without either motion for new trial or motion in arrest of judgment. The error complained of is that the judgment does not follow the verdict. Appellant claims the verdict is for thirty-five dollars while the judgment is for $3500; and it asks this court to reverse and remand the case with directions to enter up judgment for the former sum.

Respondent's first point in opposition to the appeal is that the error, if any, cannot be noticed or corrected on appeal because no motion in arrest of judgment was filed. He makes the further contention in argument that since the alleged discrepancy between the verdict and the judgment was not called to the trial court's attention either by motion in arrest, motion for new trial or motion to modify judgment, appellant's assignment of error cannot be considered.

But the alleged error appears upon the face of the record. Respondent's answer to this is that where there is no motion in arrest, nor other motion calling the court's attention to the error, there are but two instances in which the appellate court will review the record proper, namely, 1st, when the petition does not

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state any cause of action; 2d, where the trial court has no jurisdiction either of the subject-matter or of the parties. It is true in many of the cases where no such motions were filed and yet the error was considered, one or the other of these two conditions existed. But is it not more nearly correct to say that it is only defects that are fatal, and not defects in form or mere irregularities appearing on the face of the record, which will be considered in the absence of a motion in arrest or other motion? [Sweet v. Maupin, 65 Mo. l. c. 72.] The question then arises, does this mean defects that are fatal to the cause of action or fatal to the judgment rendered? If it means fatal to either then the further question arises, is not an ambiguous verdict necessarily fatal to a judgment based thereon? The judgment is not rendered until after the verdict has been received and recorded, and the verdict as written and recorded is the basis, and the only basis, of the judgment. The judgment must always follow and conform to the verdict, and, if that is capable of being understood in either of two or more possible ways, then it is impossible for the judgment to follow the verdict because it cannot follow in two opposite directions at the same time. So that it would seem that an ambiguous verdict is not merely irregular but is absolutely fatal to the judgment. And as said in Sweet v. Maupin, supra, "there are doubtless many opportunities for fatal errors to occur, between the filing of the pleadings and the rendition of judgment." That is, the insufficiency of the petition and want of jurisdiction are not the only fatal errors which will be considered in the absence of a motion. In McIntyre v. McIntyre, 80 Mo. l. c. 473, it is said that they must be material errors. In Roden v. Helm, 192 Mo. 71, the judgment was broader than the pleadings and there was nothing before the court except the record proper yet the appeal was considered. The case of Land Co. v. Bretz, 125 Mo. 418, was one in

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equity in which the petition was sufficient, the court had jurisdiction of the parties and of the subject-matter, and no motions for new trial or in arrest were filed. The trial court rendered judgment for defendant, which the Supreme Court held erroneous. The court asks the question, can the error be corrected in the absence of all motions to do so in the trial court, and held that it could. No motion of any kind is necessary to take an appeal. All that is required is that it be taken at the term at which judgment is rendered, a certain affidavit filed and the docket fee paid. [Secs. 2040 and 2041, R. S. Mo. 1909.] The appeal having been taken, sec. 2083, R. S. Mo. 1909, says: "The Supreme Court, St. Louis Court of Appeals, Kansas City Court of Appeals, in appeals or writs of error, shall *examine the record* and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." In Bateson v. Clark, 37 Mo. 31, l. c. 34, the Supreme Court referred to the above section and said: "The record proper, by law, is the petition, summons, and the subsequent pleadings, including the verdict and judgment; and these the law has made it our duty to examine and revise; and if any error is apparent on the face of these pleadings which constitute the record, we will reverse the cause, whether any exceptions were taken or not." So that whether or not we have authority in the decisions for considering an error on an appeal taken without motions for new trial, in arrest, or to modify judgment, it would seem that we have ample authority from the statutes, provided, at least, that the error be one of substance and not of form.

It is because of the above noted distinction between errors of mere form and errors fatal to the judgment that many of the decisions cited by respondent in support of his contention with reference to the

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point here considered are not applicable. We have carefully gone through them all, and in every one find that the error complained of was either a mere irregularity, which was not fatal to the judgment, or, the case was in fact disposed of on some other ground. The very life of the judgment depends upon the verdict, which it must strictly follow, and, if the error appearing on the face of the verdict is such as to render it uncertain what the verdict really was, this destroys any judgment based thereon.

With reference to the point that a motion to modify the judgment should have been filed, it must be remembered that a judgment is never rendered until after the verdict has been received *and recorded,* and that the judgment is based solely on the verdict *as recorded.* But after this has been done and the jury discharged, no modification of the verdict could be made, and hence a motion to modify the judgment would be unavailing. It was suggested in argument that such a motion would at least call the trial court's attention to the defect and give it an opportunity to correct the error, and that no error should be considered on appeal which had not been called to the trial court's attention and opportunity of correction afforded. The answer to this is that the statutes permit an appeal without a motion of any kind, and under section 2083 we are required to examine the record and pass upon any vital error shown thereby.

We must therefore hold that the appeal upon the record proper is before us for consideration although no motion in arrest or to modify was filed.

The respondent's next point is that the verdict is for thirty-five hundred dollars. Certainly the verdict does not read that way. The figures "3500" may be as well construed to read $35.00 as $3500. All that prevents the verdict from being unquestionably a complete and perfect verdict for $35 is the absence of a dot between the 5 and the succeeding zero. In fact

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respondent does not contend that the verdict on its face is for thirty-five hundred dollars. His point is that while this cannot be seen from a reading of the verdict by itself, yet that it should be read in connection with the pleadings and the case made by the petition, and interpreted so as to carry out the intention of the jury. We agree with respondent that verdicts should not be avoided or set aside except upon necessity. The case is a suit by the husband for compensatory damages for the death of his wife alleged to have been caused by a fall she sustained in walking over defendant's street crossing. Under the law the jury could have rendered any verdict from one dollar up, and while it is natural to suppose that in such a case the jury would not return a verdict for $35 but intended to render one for $3500, yet they had the right to do so, and the inference that they intended the larger sum has in reality nothing but this supposition or conjecture for its basis. It is well known, however, that suits are frequently brought in which large amounts are involved, and to the astonishment of every one but the jurors, very small verdicts are returned. So that it cannot be said that, beyond question and without assumption or guessing, this verdict was for thirty-five hundred dollars. In other words, in order to say that the verdict was undoubtedly for $3500 we must say that in many such cases jurors usually give much larger verdicts, and, therefore, we guess or assume that they intended the larger verdict in this case. But judgments must not be rendered upon guesses as to verdicts. Perhaps they are sometimes based upon guesses as to the law but surely they ought not be founded upon guesses as to such solemn and easily ascertained matters of fact as verdicts. But even though we may believe the jury intended a verdict of thirty-five hundred dollars yet the only proper and safe way to correct such an ambiguity in the verdict is for the trial court, at the time of its rendition,

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to call the attention of the jury to the defect and have the correction made in the verdict before it is received and recorded. This can easily be done and is a much safer rule than to receive and record an ambiguous verdict and then attempt by construction to arrive at the intention of the jury after it has separated and been discharged. In Haumueller v. Ackermann, 130 Mo. App. 387, the St. Louis Court of Appeals said no doubt the jury intended the verdict to be as construed by the trial court in its judgment but nevertheless that such judgment could not stand. Of course if this were a case where, under the pleadings and the facts, the verdict, by law, could not be for the smaller sum, then a different situation would arise and a different holding might follow. For instance, if this were a suit under section 5425, where the verdict could not be less than $2000 nor more than $10,000, a verdict which was so written as to be doubtful whether it was $35 or $3500 might, perhaps with propriety, be construed as a verdict for the sum within, rather than without, the bounds prescribed by law. Or, if it were a suit on a promissory note and the only defense was *non est factum* and the wording of the verdict made it read either for a very trifling and impossible sum or for the exact amount of the note and interest, it would doubtless be allowable to accept the verdict for the latter amount. Such was the case of Gurley v. O'Dwyer, 61 Mo. App. 348. The note sued on, with interest amounted to $112.16. The defense was *non est factum.* The jury found a verdict for plaintiff in which the amount, *written in figures only,* appeared thus: "$1.12 16-100." The court allowed the judgment to stand inasmuch as $112.16 was the only verdict which the jury could have rendered if they found for plaintiffs at all, and any other view would make the verdict read for sixteen hundredths of a cent. which is palpably absurd. It will also be noticed that in this Gurley case it was merely inaccurate

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punctuation which was relied upon to destroy a verdict otherwise perfectly clear in its meaning. In the case before us the only thing which prevents it from being undoubtedly for $35 in the absence of punctuation, different situation altogether.

It is unfortunate, of course, that an ambiguous verdict was thus received and recorded, and we regret that we are unable to give it the effect so earnestly and ably contended for by respondent. We are unwilling, however, to set a precedent for the rule that an ambiguous verdict may be helped out by construction where that construction is based wholly upon conjecture.

Appellant insists that unquestionably the verdict was for $35 only and that the case should be reversed and a judgment for $35 ordered. We do not agree with this view. The verdict is ambiguous. It may mean one thing and it may mean another. Hence it is no verdict at all, since a verdict must be certain and definite. The cause is therefore reversed and remanded with directions to set aside the judgment and grant a new trial. All concur.

JOSEPH G. DILLARD et al., Respondents, v. LILLIE B. FIELD et al., Appellants.

Kansas City Court of Appeals, February 3, 1913.

1. **BROKERS: Commission: Right to.** To solve the problem of a broker's right to commission, two things must be kept in mind: 1st. What was the broker employed to do? 2d. Has he completed his undertaking? If he was employed to do a certain thing and has accomplished that thing within the time required, or, where no time is specified, within a reasonable time, then he is entitled to his commission.

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2. ———: ———: **Changed Conditions.** Where a broker is employed to sell either the whole or certain specified parts only of a farm, and in the effort to sell one of those parts, introduces a prospective buyer to the owner but no sale is effected, and nothing more is done for eight or ten months, when the owner, through no help or assistance of the broker sells a portion of the farm to another buyer, which sale so changed the farm as to make possible the sale of a different portion of the remainder from any that could have been sold prior thereto, the fact that the former prospective buyer, through no help or assistance of the agent, learns of the changed conditions and renews negotiations which result in a sale to such buyer of a different part from that shown to him in the first place, does not entitle the agent to commission, in the absence of bad faith on the part of the owner.

3. ———: ———: **Disclosure of Purchaser.** Wherever an introduction, or advertisement, or disclosure of purchaser is relied on to entitle the broker to commission, the evidence must show that such was the foundation of the negotiations which resulted in a sale although conducted and concluded by the owner. When the evidence shows that the introduction was only a link in a chain of causes and not the *causa causans*, the broker cannot recover.

4. ———: ———: **Variation in Both Price and Thing Sold.** Where the sale made varies from the broker's contract, both in price and in the thing sold, there can be no recovery of commission.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain,* Judge.

REVERSED.

G. W. Barnett for appellants.

W. D. O'Bannon and *W. D. Steele* for respondents.

TRIMBLE, J.—Respondents, real estate brokers, doing business as Dillard Brothers Realty Company, sued appellants, who are husband and wife, for commission on a sale of real estate. Appellants filed a demurrer to the evidence which was overruled and judgment rendered against them. Their contention here is that, under the law and the undisputed facts, respondents had no case.

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In the summer of 1910, appellants, having a farm of 280 acres, placed it in respondents' hands to sell. There was no exclusive agency as it was also listed with several other agents. Shortly thereafter appellants sold off forty acres leaving the remaining 240 with respondents and the other agents as before. The house and other improvements were located on the south forty of the west eighty, and immediately adjoining this eighty on the east was a sixty. The county road ran east and west along the south ends of this sixty and eighty and then turned north along the west side of the eighty. These facts are stated to show that when appellant authorized respondents to sell either parts or the whole of said farm, they of necessity authorized a sale of only particular parts thereof but not any portion which might be carved out of the 240. They were willing to sell either the north forty of the west eighty, or they would sell the entire west eighty or they would sell this west eighty and the west thirty acres of the adjoining sixty, making 110 in all, or they would sell the entire farm. This was no arbitrary whim or caprice with them. They could not do otherwise. The north forty was cut up by ravines and was thinner and poorer land. If they sold the south forty, or the south forty and any thirty of the adjoining sixty they would practically isolate the north forty and greatly injure its subsequent sale, besides deprive themselves of a good building site for the rest of the farm, which site was on the south end of the sixty and fronted on the east and west road.

Plaintiffs' petition says they were employed to procure a purchaser for, or make a sale of, defendants' farm, or *any* part thereof. The evidence, however, is that in selling only a part of said farm, respondents were authorized and employed to sell only those parts indicated above. In other words, plaintiffs were employed to procure a purchaser for, or to make a sale

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of, either the whole of said farm, or the above mentioned parts only.

About the middle of July, 1910, one of respondents found a Mr. Emery Rutt and took him out to appellants' farm, introduced him to Mrs. Field and tried to sell him the west eighty. The agent claims that he tried to sell him the whole farm and that Rutt saw more than the aforesaid eighty. Rutt, however, says he went out there wanting only eighty acres, that he was shown only the west eighty and did not consider any more than eighty, or any other part of said farm. Mrs. Field says that when the agent introduced Rutt to her he said, "I have brought Mr. Rutt out for the purpose of buying this eighty acres." Whatever may be the truth of this, the undisputed evidence is that the negotiations had between Rutt and Mrs. Field and between Rutt and the agent were solely over the west eighty. Respondents admit that the price discussed was solely on the west eighty or the whole farm and not upon any seventy acres. Rutt objected to the poor and broken north forty and to the price of $165 per acre or $13,200 for the eighty. He and the agent left and on the way home Rutt told the agent that if he could get the eighty for $10,000 he might consider it. But these terms the agent was unable to procure. Rutt says the agent never said anything to him about it afterwards, but the latter claims that he mentioned the matter to him at different times but it was always in reference to the west eighty. He was unable to get anywhere with him, however, as Rutt would not even consider terms. The agent never took Rutt to the farm again, nor did he try to sell him any land other than the west eighty, nor was he requested by the appellants to sell any other particular part. In fact, attempts to sell to Rutt ceased on the part of plaintiffs.

Matters ran along thus from July, 1910, to June

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1, 1911, when Mrs. Field sold the north forty to one Thistlewaite. Respondents had nothing to do with this and knew nothing of it. A few days later Rutt's father-in-law, Mr. Bowman, learning that this objectionable forty had been sold and, thinking that possibly another portion could be purchased, went to the Field farm and began negotiations which resulted in a purchase for Rutt by Bowman of seventy acres, forty of which was the south forty of the west eighty but thirty of which was a different thirty from that comprising the 110 acres, which the Fields had originally agreed with respondents they would be willing to sell in a sale of only a part of the farm. It is over the sale of this seventy acres that the controversy here rages. Respondents admit that after the sale of this north forty to Thistlewaite, appellants never asked them to sell this particular seventy nor any other part only of the farm left. They claim, however, that Mrs. Field did talk to them about a sale of the whole after June 1, 1911, the date of the sale to Thistlewaite, and that inasmuch as the Fields did not tell them they had sold the forty and no different arrangements were made with them, the remainder of the farm was still left in their hands on the same terms as before, that is, to sell it either in part or in whole, and, if a part only were sold, they were to receive a commission on the part sold. Respondents' evidence as to the original terms is as follows: "The original arrangements were to sell the farm if we could find a buyer for her. I asked Mrs. Field how small an amount she would sell. *She said she would sell forty, eighty or one hundred and ten acres or the whole and that is about all there was to that arrangement. Whatever we sold* we were to receive our regular commission of 2½ per cent on whatever the price was on whatever she agreed to sell for."

It will be seen from the foregoing statement that, if respondents are entitled to commission, it is based

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solely on the introduction of Rutt to Mrs. Field brought about by respondents at the time they were trying to get Rutt to buy the west eighty. At that time no one was contemplating the sale of the seventy, and so long as the north forty remained unsold, it was never thought of being offered for sale, except as included in a sale of the whole. The only work done by respondents was to introduce Rutt to the Fields and attempt to sell him the west eighty. In this they failed, and, so far as outward manifestations are concerned, the matter was dropped. They made no efforts to sell Rutt any other part of said farm, nor were they requested or authorized by the owners to sell the seventy after Thistlewaite had bought his forty. Nor did respondents have anything to do with the sale to Thistlewaite or with the negotiations begun by Mr. Bowman for the purchase of the seventy. In fact, they did not keep in touch with matters close enough to learn of the Thistlewaite sale until after Bowman had purchased the seventy, although the Thistlewaite deed was recorded June 1, and Bowman began his negotiations for the seventy acres about the first of July, not knowing that respondents had anything to do with the land. In order to solve the puzzling and sometimes difficult question whether an agent is entitled to his commission, two questions should be steadily kept in mind: 1st, what was the agent authorized or employed to do? 2nd, has he completed his undertaking? Plaintiffs' theory is that they were authorized to sell the whole farm or any part whatever thereof, regardless of where it was. But the facts and the evidence show that they were authorized to sell only certain specified parts; that they never attempted to sell the part for which commissions are now claimed, and this part could be sold by them only as included in a sale of the whole. In the attempt to sell the west eighty they introduced a man to the owners but no sale was ever consummated. In other

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words, their efforts failed. After the lapse of eight or ten months the situation of the owners changed by reason of their being able, through no efforts nor influence of respondents, to rid themselves of the Thistlewaite forty. They are now in a position where they can carve out and sell a seventy and still keep their building site for the remaining land they own. No new contract is made with respondents; they are not asked to sell this seventy nor do they do anything to further its sale. Nor do the owners hunt up the man they had originally met through respondents' efforts and make use of that introduction. On the contrary, Mr. Bowman, *hearing* of the sale of the Thistlewaite forty, took it upon himself to see if he could not buy a different portion of the farm for his son-in-law, Rutt, and went over to the Fields' farm and opened up negotiations which were successful. In other words, respondents did not procure a purchaser for the seventy acres, nor did their efforts, after the owners were in a position to sell same, have anything to do in bringing about a sale. Whenever an introduction, or advertisement, or disclosure of purchaser, is relied on to entitle a broker to commission, the evidence must show that it was the *foundation* of the negotiations which resulted in a sale although conducted and concluded by the owner. Even if the introduction of Rutt in the first place could be said to have anything to do with the sale that afterward took place ten months later and under changed conditions, still this was only a link in a chain of causes and not the *causa causans*. In order for respondents to recover, the evidence must show that their efforts were the procuring cause and not merely one of a chain of causes. [Russell v. Poor, 133 Mo. App. 723.] Here also the sale made varies from respondents' contract both in price and the thing sold. Hence there can be no recovery. [Tooker v. Duckworth, 107 Mo. App. 231.]

Judgment reversed. All concur.

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KANSAS CITY et al., Respondents, v. WM. C. FORSEE, Defendant, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **REFEREE'S REPORT: Exception to: Must be Filed Within Four Days After the Return of the Report.** The motion to set aside the referee's report in this case, while so worded as to be different in form, was in reality a series of exceptions to the report, and having been filed long out of time was properly overruled.
2. **APPELLATE PRACTICE. Equity Case: Entire Evidence.** In the absence of some of the evidence in an equity case, the appellate court will not pass on the question whether, upon the evidence, the court erred in modifying the referee's report.
3. **REFEREE'S REPORT: Right to Modify.** The right of a court of equity to modify a referee's report, especially when the court has before it all the evidence upon which the referee's report is based, is too well settled to require discussion.
4. **JUDGMENT: Satisfaction: Interest.** Appellant had two judgments but was entitled to but one satisfaction, the judgments being for the same services. *Held*, that when appellant received satisfaction of one judgment in full with interest, the full amount received, including the interest, was properly credited on the other judgment, as of the date it was collected. Such credit should not be for the face of the judgment merely, since appellant would be no more entitled to receive interest twice for the same time than he would to collect the principal twice.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn*, Judge.

AFFIRMED.

Samuel P. Forsee for appellant.

Edward P. Garnett for respondents.

TRIMBLE, J.—In June, 1900, Kansas City condemned certain land to be used in creating Penn Valley Park. In that proceeding, $28,762 was awarded M. S. C. Donnell for land owned by him upon which

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were several deeds of trust held by the Citizens' National Bank. Donnell owed other creditors and they were all trying to get their claims paid out of the above fund. The said bank, on February 15, 1901, brought suit to impound the money awarded Donnell, to restrain the city from paying it out and to have its claims adjudged superior to all others. Donnell and all claimants were made parties defendant with the city. April 10, 1901, the city brought a bill of interpleader against Donnell, the bank and all the other claimants, deposited the fund in court and prayed that they be required to interplead. To this all parties appeared and set up their several claims. Among them, the defendant William C. Forsee, on October 26, 1901, filed his answer and cross-bill against Donnell alleging an indebetedness due the former of $5441 for attorney fees in many matters therein specified. Donnell answered denying liability.

The two suits above referred to were consolidated; and on January 15, 1902, the court, by agreement of all parties, referred the cause to Mr. J. V. C. Karnes to hear and decide the whole issue and report. While the referee was hearing the various claims, Forsee and Donnell on February 19, 1902, entered into a written stiuplation wherein it was agreed that Forsee was entitled to recover $4500 from Donnell, and *that the referee should render judgment in favor of Forsee and against Donnell for said sum*; and that the judgment for $3792.90 in the case of Forsee v. Catherine E. Donnell, rendered January 19, 1901, is for a portion of the same services and claim for which judgment is herein stipulated, the agreement in no way to affect Forsee's right to all legal remedies on said judgment against Catherine E. Donnell.

This stipulation was presented to the referee, but it is not exactly clear from the record presented to us just what action the referee took upon it at that time, except that, in a preliminary report, he must have

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either found that Forsee was entitled on said stipulation to an allowance in his favor of $4500, or treated it as having been allowed. Because, on December 31, 1902, the court overruled exceptions filed by Donnell and his wife to a preliminary report, and ordered, among other things, a payment to Wm. C. Forsee of $250 "on account of the amounts due said parties by M. S. C. Donnell." Again, on January 9, 1902, the court, upon another preliminary report of the referee, and upon the evidence taken before the referee, ordered $150 paid to Forsee, and, June 25, 1907, made a similar order for $93.54 to be paid him.

The judgment against Catherine E. Donnell for $3972.90 mentioned in the stipulation above referred to, was obtained by Forsee in a suit instituted by him in December, 1899, against M. S. C. Donnell and Catherine E. Donnell, in which suit he dismissed as to M. S. C. Donnell, and judgment for that sum against Catherine E. alone was rendered in January, 1901. In the cross-bill against Donnell, in the case before the referee, Forsee specifically alleges that Donnell and his wife, Catherine E., are jointly and severally liable for the fees sued for, and that Donnell was jointly liable with his wife for all the fees demanded in the suit against her.

The referee filed his *final* report May 18, 1903, in which he found that this judgment against Catherine E. Donnell for $3792.90 was fully paid and satisfied of record and that Forsee received thereon the sum of $4054.81 March 13, 1902. And the referee, upon evidence taken and admissions made before him, construed the above stipulation to mean that the Catherine E. Donnell judgment was for the same services as the $4500 stipulation and that said judgment, when paid, should be credited on said $4500 judgment. Said referee, therefore, credited said latter judgment with the amount received on the former and also with the amounts theretofore paid Forsee

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under decretal orders of the court, and reported that Forsee was entitled to recover the sum of $269.47 with 6 per cent from February 2, 1903, until paid. This action of the referee was based not only upon the wording of the stipulation but also upon evidence taken in reference to the whole matter, which evidence was preserved in written form and attached to and filed with his final report. Two days after the filing of the referee's final report, Donnell filed exceptions to the referee's finding that $269.47 was still due Forsee, claiming in said exceptions that only $63.19 was due him and tendering said amount to him. *Forsee filed no exceptions,* and the cause stood on Donnell's exceptions to the report from May 20, 1903, until April 1, 1910, a period of nearly seven years, at which date the court took up the question of passing upon the Donnell exceptions and the disposition to be made of said final report. (It may be well to state in passing that the reason the case stood thus so long was that it was awaiting the settlement of different branches of the controverties between Donnell and his creditors in the Supreme Court of Missouri and the Supreme Court of the United States.) During this lapse of time Donnell died but the cause was properly revived against his administrators who are really the only respondents now interested in this case. When the court in April, 1911, took up the referee's final report, the defendant Forsee, *for the first time in any way,* attacked said report by filing a motion to set aside said report, so far as it affected him, and also a motion for judgment on the stipulation filed before the referee. The court overruled both of these motions, took up the Donnell exceptions to said report as to its finding that $269.47 was yet due Forsee, and modified said report so as to find only $16.30 yet due him and rendered judgment in his favor and against the estate of M. S. C. Donnell for that amount. Whereupon appellant perfected an appeal to this court, alleging as

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error the action of the court in overruling his motion for judgment on the stipulation, and in overruling his motion to set aside the referee's report as to appellant's claim. Error is also claimed because the court sustained Donnell's exceptions to the report, because it modified the referee's report and entered judgment thereon as modified, because it refused to enter the judgment prayed for by appellant, because it did not correctly compute the amount due appellant, and because it credited the $4500 judgment with the full amount received on the Catherine E. Donnell judgment. But these assignments are either untenable on their face or else cannot be considered by the appellate court for reasons appearing hereafter.

The motions to set aside the referee's report and to render judgment on the stipulation filed with the referee are in the nature of exceptions to the report. While they are so worded as to be different in form, yet this is what they really are. As such, they were not filed in time. The statute requires them to be filed within four days after the return of the report. [sec. 2012, R. S. 1909; Berry v. Rood, 209 Mo. l. c. 673, and many other cases.] But the case need not be disposed of on such a cold and heartless technicality. The referee was appointed for the very purpose of ascertaining the exact amount due each claimant so that it could be paid out of the fund in the hands of the court. The stipulation did not withdraw appellant's claim from the referee. On the contrary, it provided that, "The referee shall render judgment in favor of said William C. Forsee and against said M. S. C. Donnell for the said sum of $4500 and the costs." Nor was the referee tied hand and foot so that he could not go outside of the stipulation, after allowing the $4500, to find out what sums were thereafter received thereon so as to be able to tell the court the precise amount finally to be paid appellant out of the fund. He heard evidence in regard thereto, which was

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preserved and returned to the court for its consideration in passing upon the report. It is urged that we cannot know this fact since the testimony before the referee is not preserved in the bill of exceptions. This may be true so far as our ability to examine that evidence is concerned. But, while the evidence is not preserved in the record before us, the fact that it was taken and considered both by the referee and the trial court, is shown in the record. And this is one answer to the contention that the court erred in modifying the report and rendering judgment on the report as modified, since, in an equity case we cannot determine that question unless the evidence on which the court's action was based is shown. [Pitts v. Pitts, 201 Mo. 359; Construction Co. v. Westen, 153 Mo. App. 185.]

But even if it were the law that, in this kind of an equity case, the referee could not go outside of the stipulation to find what was in fact due appellant, still we think the stipulation contains enough on its face to require him to ascertain whether any sum had been received on the Catherine E. Donnell judgment and to credit that sum on the $4500 before reporting to the court what amount should be finally paid appellant out of the fund. At any rate the claim was presented to the referee in order that he might pass thereon and direct what amount should be paid appellant of the fund in court. The referee took the stipulation at its face, $4500, ordered various payments at different times to be made thereon to appellant, which were accepted by him without question, heard evidence as to other payments thereon, and then determined the final amount due appellant and so reported to the court. The appellant made no objection nor filed any exceptions thereto whatever until years after when the party against whom he is proceeding is dead and the fund has been practically paid out. Then appellant files motions attacking the report as being erroneous and also because the referee had no power to hear or pass

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upon appellant's claim in the first place. We think that under all the circumstances the chancellor did right in overruling the motions.

The other assignments of error, except two, are not contained in the motion for new trial and hence are not before us for consideration. Even if they were in the motion for new trial, owing to the absence from the record of the evidence on which the court's action was based, some of them could not be dealt with by us as hereinabove stated. The two errors remaining relate to the modification of the referee's report on Donnell's exceptions and to the rendition of judgment on said report as modified. It is claimed that they are properly before us because they appear upon the face of the record. But when it is remembered that this is a suit in equity, the chancellor's right to correct the findings of the referee on the evidence as reported, and to enter a decree on the facts as found, is too well settled to require discussion. [O'Neill v. Capelle, 62 Mo. 202.] The complaint that the court did not correctly compute the amount due even on the facts found by it, is based on the contention that, even if the judgment against Catherine E. Donnell should be credited on the $4500, still it should be credited only with the face thereof and not with the judgment *and interest* received. Appellant had two judgments but was entitled to but one satisfaction since they were both for the same services. It would seem that he would be no more entitled to receive interest twice for the same time than he would to collect the principal twice.

The judgment is affirmed. All concur.

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A. G. HULL, Respondent, v. MARY BACON HULL, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **APPELLATE PRACTICE: Equity Case: Partial Record.** Where appellant, in an equity case, fails to bring the entire evidence before the appellate court, appellant's claim of the insufficiency of the evidence will not be considered.
2. **DIVORCE: Evidence.** In this case, however, the evidence presented is reviewed and *held* sufficient to justify a divorce to plaintiff and the dismissal of defendant's cross-bill.
3. **EQUITY CASE: Weight of Testimony.** Appellate court can, in an equity case, weigh the testimony for itself and is not bound by the findings of the trial court, yet the latter's better opportunity to weigh the testimony is recognized and where it is conflicting and apparently of equal force and plausibility the trial court's judgment therein will be deferred to, if there is sufficient evidence upon which to base it.

Appeal from Bates Circuit Court.—*Hon. Charles A. Calvird,* Judge.

AFFIRMED.

A. J. King and *Sol. L. Long* for appellant.

Scott & Bowker for respondent.

TRIMBLE, J.—Suit for divorce on the ground of indignities. The answer and cross-bill denied the charges, alleged indignities on the part of plaintiff and prayed a divorce for defendant. The case began in the circuit court of Vernon county, but on a change of venue applied for by defendant, was sent to Bates county. There a trial was had and a judgment rendered in which defendant was allowed $300 temporary alimony, a divorce awarded plaintiff on his petition and defendant's cross-bill dismissed.

The sole error complained of by appellant is that the evidence is insufficient to justify a divorce to plaintiff.

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The abstract of record neither contains nor pretends to contain all of the evidence in the case. It sets forth the testimony of plaintiff and defendant; but, with reference to the testimony of a number of other witnesses, it gives merely appellant's conclusion as to what such other testimony tends to prove. It also shows that certain letters written by appellant were in evidence, but their contents are not set out in the abstract. The sufficiency of the evidence being in question, it was the duty of defendant, under Rule 15 of this court, to have set it all out fully and completely in her abstract. And, we could decline to consider appellant's appeal because of this defect in her abstract. [Nichols v. Nichols, 39 Mo. App. 291; Nash v. Brick Co., 109 Mo. App. 600; Yancy v. Jones, 153 Mo. App. 206.] But, in a case of this character, we perfer to consider the appeal, if possible, rather than dismiss it for failure to comply with the above rule. We have, therefore, carefully examined the evidence set out to see whether or not the assigned error is well founded so far as the evidence shown is concerned. We are of the opinion that upon the evidence shown, if believed to be true, the trial court was fully justified in granting plaintiff a divorce. It shows, or tends to show, the following state of facts: Plaintiff was a farmer seventy-seven years old. He had been married before, living forty-six years with his first wife, and had reared a family. His first wife died about nine years prior to this marriage. Defendant was fifty-three years of age, and this was her third marriage, her first husband being dead and the second divorced. Plaintiff met defendant at Nevada whither she had gone to attend a convention of the so-called "New Thought" Cult. They were married at the Weltmer Institute, an organization teaching an alleged system of mental healing without the use of drugs. They lived together five months when defendant, on the pretext of going to the home of one of the healers of the

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Institute for treatment, left plaintiff's home, in company with the healer and his wife, and four days later brought suit for divorce alleging certain scandalous and indecent charges not fit to be set out here. The circuit court heard those charges and dismissed her petition. Thereupon, defendant either telephoned or sent word to defendant that she wanted him to absent himself from his home so that she could go there and get her things without the annoyance of seeing him. He complied with her request and left for a time. Upon his return he found his wife with her goods barricaded in two of the rooms. When he asked at the door who was in there, she replied "The lady of the house. I have come to stay, and you had better go away, or I will put something through you you don't want." Plaintiff lived thus about a month and then left his home and afterwards brought this suit. In addition to the foregoing the evidence tended to show that a little over a month after they were married defendant wanted plaintiff to remove some tin cans from the back lot, and when plaintiff said he would have them removed as soon as a dray came around, his wife insisted upon his doing it at once and in the course of the curtain lecture told him, "You don't know what I came here for but you will find out before four or five years." It also tends to show, somewhat vaguely perhaps in the printed record, that she was cold toward him, treated him with contempt, failed at times to get his meals, and intimated to him that she was living in a world of thought which he could neither enter or understand. It also shows, and this she practically admits, that she wrote down scandalous and indecent charges against her husband and showed them to one or more of his friends. These were the same charges contained in her petition for divorce and reiterated in her cross-bill. It is unnecessary to state the scandalous and indecent charges above referred to. The court heard defendant's testimony in regard to them,

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but evidently did not believe them to be true. Nor is it necessary to enumerate other instances of alleged misconduct contained in the testimony upon which plaintiff based his right to a divorce. Suffice it to say that all in all the evidence, if true, was amply sufficient to entitle plaintiff to a divorce. Appellant denies most of these charges but admits some of them.

It is true, in an equity case, the appellate court is not bound by the conclusions of the trial judge, but can for itself weigh and determine the evidence and its sufficiency. In this case, however, owing to the charges and recriminations made by each of these parties against the other, the trial judge who saw and heard the parties is in a much better position than we are to decide which one was telling the truth. Two circuit judges heard the testimony in regard to defendant's charges against her husband and both rejected them as untrue and decided in favor of the plaintiff. We would be inclined to defer to the conclusion of the trial court, even if the evidence upon which the divorce was granted did not of itself show some earmarks of its truthfulness. The judgment is therefore affirmed. All concur.

JOHN W. TAYLOR, Appellant, v. JAMES WELCH, VIRGINIA A. WELCH, and L. W. SCOTT, Trustee, Respondents.

Kansas City Court of Appeals, February 3, 1913.

1. **EQUITY: Trust Fund: Creditors of Beneficiaries: Husband and Wife.** Plaintiff sued in equity, to obtain a decree declaring a trust in his favor, and to compel the trustee to pay to him the sum due him out of the trust fund. Defendant James Welch sold a farm and his wife joined in the deed. The proceeds of the sale were placed in the hands of the defendant Scott as trustee, the terms of the trust being fully expressed in writing.

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The trustee, after paying all debts, was to turn over a certain amount of money for their maintenance. Welch, several years prior to the commencement of this action, notified the merchants that he would not be responsible for her debts. Plaintiff continued to sell goods to Mrs. Welch, and one month after this trust agreement was entered into, brought suit against both the husband and wife and obtained judgment against the wife only. Plaintiff now seeks to recover the amount of the judgment from the trust fund. *Held*, that the trust deed created a trust in favor of plaintiff, a creditor of Mrs. Welch, which he is entitled to have enforced in an equitable action.

2. ———: **Trusts, Executed or Executory: Written and Parol.** To create either an executed or an executory trust as to personal property, it is not essential that the trust be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trust as is the case with an express trust relating to land. A trust as to personalty may be proved by parol.

3. ———: **Trust Agreements: Retention and Control: Beneficiaries.** When parties by a trust agreement make themselves and their creditors the beneficiaries, and as such, they retain an equitable estate in the fund, such a retention is not inconsistent with the creation of a trust.

4. **TRUSTS: Terms: Requisites.** Three things must occur to raise a trust: sufficient words to create it, a definite subject and a definite object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared.

5. ———: **Executory and Executed.** Where the limitations of the trust are fully and perfectly declared, it is regarded as an executed trust; where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his interest is to be carried into effect substantially in the discretion of the trustees, it is an executory trust.

6. ———: ———: **Consideration.** A promise to create a trust cannot be enforced, if it be unsupported by a valuable consideration, for it is only executory. But if it is executed, the absence of a consideration is immaterial and it may be enforced though voluntary.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis*, Judge.

REVERSED AND REMANDED (*with directions*).

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T. H. Harvey for appellant.

L. W. Scott for respondents.

JOHNSON, J.—This is an action in equity begun in the circuit court of Saline county, December 9, 1910, to obtain a decree declaring a trust in favor of plaintiff and ordering the defendant Scott, as trustee, to pay plaintiff the sum due him as such beneficiary.

The answer, which is voluminous, denies the existence of a trust in favor of plaintiff and interposes the additional defense of *res adjudicata*. Defendants prevailed in the circuit court and the cause is before us on the appeal of plaintiff.

The defendants, James Welch and Virginia A. Welch, husband and wife, live in Saline county where the husband owned a valuable farm. He became an invalid, unable to attend to business and placed his affairs in the hands of an agent to whom it appears he gave very wide and comprehensive authority. The agent first appointed resigned in 1906 and defendant Scott was appointed in his stead. The authority with which Welch invested Scott included the power to lease the farm, to collect rent, pay taxes and interest on certain notes the Welches had executed and to divide the remainder of the income equally between Welch and his wife. This arrangement continued until March 14, 1910, when defendant Welch sold the farm for $19,923.75. A warranty deed was executed and delivered to the purchaser and Scott received the payment of the purchase money. Mrs. Welch joined in the execution of the deed for the purpose of conveying her inchoate right of dower. On March 14, 1910, and immediately after the consummation of the sale and the payment of the purchase money to Scott, the defendants executed the following instrument in writing:

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"This instrument of writing, made and entered into by and between James Welch and Virginia Welch, his wife, of the county of Saline, State of Missouri, parties of the first part, and L. W. Scott, of said county and State, party of the second part,

Witnesseth, That whereas the said parties of the first part have sold their farm in Saline county, and now have on hand a large sum of money, the proceeds of said sale, and whereas there are several debts which the parties of the first part now owe, and whereas it is the wish and desire of the parties of the first part to pay off and discharge all debts now due and outstanding, and to make provision for the support and maintenance of their family for the ensuing year, and whereas it is the wish and desire of the parties of the first part to make a lifetime provision for the support and maintenance of themselves and their family for and during the period of their natural life and the lifetime of the survivor of them and whereas, the said James Welch, by reason of a stroke of paralysis by which he was afflicted some years ago, has become so feeble and infirm of body as to render him unable to attend to business and, having now reached such an advanced age in life that he can never hope to resume business again even though he should recover entirely from his partial paralysis from which he has so long suffered, and whereas the parties of the first part desire to place this money in the hands of a safe and discreet business man to take care of, to manage, loan out, and collect all interest which shall accrue therefrom, out of the principal remaining after certain expenditures hereinafter set forth are made, and believing that the said L. W. Scott, party of the second part is such a person, qualified to discharge the trust herein and hereby created, therefore, he said James Welch and Virginia Welch, his wife, parties of the first part, do by these presents, assign, transfer and set over unto the said L. W. Scott, party of the second part,

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all the money derived from the sale of the farm aforesaid, heretofore mentioned, to have and to hold to him and his successors in trust, however for the following purposes:

"Said party of the second part shall out of said money turned over to him as aforesaid, pay all debts now due and owing by said parties of the first part or either of them, in whatsoever form said debts are now in. Further, said trustee shall deposit the sum of two hundred dollars ($200) in the Wood & Huston Bank to the credit of the said James Welch, one of the parties of the first part, for his own individual use and benefit. And the sum of $100 shall be turned over to Virginia Welch, one of the parties of the first part, by said trustee. Further, said trustee shall set aside out of said sum of money, a fund to the amount of three hundred dollars ($300), to be applied from time to time by the party of the second part to the support and maintenance of the parties of the first part during the ensuing year. Further, said trustee, party of the second part, after paying off all debts now due and outstanding, and after making said deposit in said bank as aforesaid, and after setting aside said fund as aforesaid, shall adopt and use the balance or surplus remaining as the stable or perpetual principal that is to be kept intact and preserved until the time of its final distribution, as hereinafter provided, arrives.

"The said trustee, party of the second part, shall have full power and authority to loan out said principal or any part thereof to any person or persons, on good real estate security, or with said principal or any part thereof purchase notes from others that are so secured, said loans and notes so purchased shall bear the best rate of interest obtainable by said trustee, regard being had to the security offered. And the said trustee shall collect the interests on said loans or notes annually or at such time as said interest is

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collectible, out of which said interests he shall first pay the taxes on said principal, and second, he, the said trustee, shall reserve for himself a reasonable fee for his services, and third, he shall pay the premium on the bond of the trustee, if such bond is required, as hereinafter provided, and the balance or remainder of said interests shall be applied, first to the payment and discharge of all debts made or created by the parties of the first part or either of them, if the balance remaining of such interests is sufficient for such purpose, and if not sufficient for such purpose, then said trustee is hereby vested with full and discretionary power to pay off and discharge such of said debts as he himself shall determine were created for the support and maintenance of the parties of the first part or their family. And if after the payment and discharge of the debts as above provided, there shall remain a balance in the hands of said trustee, such balance, if any, remaining shall be turned over to the parties of the first part equally. The income from said principal as above provided shall be expended as above directed for and during the joint lives of the said parties of the first part, for and during the lifetime of the survivor of them, and upon the death of said survivor, the said trustee shall collect and gather in all outstanding loans, and divide said principal among the children and descendants of the said parties of the first part, according to the laws of the descents and distribution of the State of Missouri, the said trustee reserving for himself, however, a reasonable amount to compensate himself for collecting in said loans and distributing the money as above provided. It is hereby further provided that the parties of the first part may at any time hereafter as they see fit, require the party of the second part or his successor to give a good and sufficient bond, conditioned for the faithful discharge of the trust herein created, which said bond as herein provided for shall be passed

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upon and accepted by the judge of the circuit court within and for Saline county, Missouri. If so required by parties of the first part, the trustee shall pay for the premium on same out of the interests derived from the principal as above provided.

"It is further provided and agreed upon by the parties hereto, that the parties of the first part, or the survivor of them, shall have the right to require the trustee to make an accounting of this trust to the circuit court aforesaid. It is further provided that the party of the second part shall have the right at any time to resign from the trust herein created by presenting his resignation to the said circuit court and making final settlement of this trust. It is further provided that in event of the death, resignation, or inability of the trustee, party of the second part, to discharge this trust, the judge of the said circuit court for the time being shall have the power to appoint a successor, and the right to appoint a trustee at any time a vacancy occurs in the said office of trustee.

"And the said party of the second part hereby accepts said trust and agrees and binds himself to carry out and execute this trust to the best of his judgment and ability," etc.

Pursuant to the provisions of this instrument Scott retained possession of the proceeds of the sale of the farm and has administered the trust fund into which they were converted by the instrument just quoted. The main question at issue is whether plaintiff is one of the persons for whose benefit this trust was established.

It appears that Welch, prompted by the conviction that his wife's extravagance would ruin them, notified the merchants with whom they had been dealing not to allow her to purchase goods on his credit. Disregarding this notice, plaintiff sold goods to Mrs. Welch in the years 1903, 1904 and 1905, and charged them to her and her husband. The account was not

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paid and in April, 1910, a month after the execution of the trust deed, plaintiff brought suit on the account against both husband and wife in the circuit court of Saline county. Welch filed a separate answer in which he alleged that plaintiff had been notified not to sell goods to Mrs. Welch on credit and had sold the goods in controversy in defiance of that notice. The proof sustained this allegation and the jury in obedience to a peremptory instruction found in favor of the defendant husband in their verdict. The issues relating to the liability of Mrs. Welch were submitted in appropriate instructions and the jury returned a verdict for plaintiff against her in the sum of $503.42 and costs. Judgment was rendered accordingly. The final object of the present suit is to recover the amount of this judgment from the trust fund in the hands of the defendant trustee on the ground that the judgment belongs to one of the classes of debts the trust deed provided should be paid by the trustee out of the proceeds of the sale of the farm.

It is argued by counsel for plaintiff that the instrument in question is a trust deed in legal effect as well as in the name given it by the parties, that it created an executed trust and that since it expressly provided for the payment of the existing debts of Mrs. Welch, plaintiff, whose demand against her had accrued before the execution of the instrument, was one of the beneficiaries for whose benefit the trust was called into being and, as such, is entitled to the payment of his demand out of the trust fund.

The position of counsel for defendants thus is summarized in his brief: "The fact in reference to said instrument of writing is that while it has some of the elements of a trust and is called a trustee's deed, yet it is not such a deed. No consideration is mentioned in it and none was paid, and 'consideration is the very life and essence of a contract; and a contract or promise for which there is no consideration

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cannot be enforced.' It was not acknowledged and it cannot be recorded. It is a mere private contract of agency, something like a power of attorney in which the agent or employee is directed what his employers want him to do at some time in the future. It is executory and may be recalled or revoked at any time."

Though the subject-matter of the instrument was a fund derived from the sale of real property owned by defendant James Welch, the expressed purposes of the conveyance very clearly bespeak an intention on the part of the grantor, the said Welch, that the fund should be regarded and treated by the trustee as personal and not as real property. We shall give heed to this manifest intention and shall regard the conveyance as having affected an immediate conversion of the proceeds of the land into personalty. To create either an executed or an executory trust as to personal property, it is not essential that the trust be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trust as is the case with an express trust relating to land. [Watson v. Payne, 143 Mo. App. l. c. 726, and cases cited.] A trust as to personalty may be proved by parol. [Mulock v. Mulock, 156 Mo. 431.]

Consequently there is no merit in the point that the instrument in question cannot be treated as proof of a trust on account of the absence of an acknowledgment. As we have just observed, a trust in personalty may be proved by parol and certainly may be proved by an unacknowledged written instrument signed by the party enabled by law to declare such a trust. The instrument clearly evinces the purpose to create a trust. In clear and apt terms the grantors divested themselves of the legal title to the property and vested it irrevocably in the trustee and his successors in the trust. They made themselves and their creditors the beneficiaries and, as such, they retained an equitable estate in the fund, but it is well

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settled that the retention by the grantor of such equitable estate is not inconsistent with the creation of a trust. [In re Estate of Soulard, 141 Mo. 642.]

It is said in the case just cited: "Three things . . . must concur to raise a trust: Sufficient words to create it, a definite subject and a definite object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared." And further it is said in the same case: "In order to render a sufficiently expressed voluntary trust valid, it is only necessary that the trustor should have done everything which could have been done, the character of the property comprising the trust being considered, to transfer the property to the trustee in such mode as will be effectual to pass the title." Tested by these rules, the instrument clearly created a trust and we pass to the question of whether it was an executory or executed trust.

"The distinction between executed and executory trusts rests upon the manner in which the trust is declared. Where the limitations of the trust are fully and perfectly declared, it is regarded as an executed trust; where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of trustees, the trust is an executory trust." [28 Am. & Eng. Ency. of Law (2 Ed.), 865.]

And in Perry on Trusts (Vol. 1, 6 Ed., sec. 359) it is said: "Thus a trust . . . so clear and certain in all its terms and limitations that a trustee has nothing to do but carry out all the provisions of the instrument according to its letter, is called an executed trust. . . . They (trusts) are called executory not because the trust is to be performed in the future, but because the trust instrument itself is to be moulded into form and perfected according to the outlines or instructions made or left by the settler or testator."

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In the recent case of Watson v. Payne, 143 Mo. App. l. c. 728, we held that an executed trust is one that is completely created or declared; an executory trust one that is incomplete—a promise to create a trust. [Citing 3 Pomeroy Eq. Juris. (3 Ed.), sec. 996.]

The trust before us is complete and certain in all its terms and limitations, the trustee had nothing to do but to carry out its terms, and under the rules stated in the authorities to which we have referred, the trust clearly is executed and not executory. Being an executed trust it is immaterial whether or not it is supported by a valuable consideration. The rule thus is stated by the Supreme Court:

"A voluntary trust must be created by the donor himself, and not by the court. In Stone v. Hackett, 12 Gray, 227, BIGELOW, J., says: 'A voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions enforced against all persons except creditors or bona fide purchasers without notice. It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of the trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the relation of trust and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.' These principles seem to be well established. [Thornton on Gifts, sec. 412, and cases cited; 8 Am. & Eng. Ency. of Law, 1233, and cases cited; see, also, note to Williamson v. Yager, 91 Ky. 282.]" [In re Estate of Soulard, supra, l. c. 660.]

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And in Watson v. Payne, supra, we held that under the rule that as a promise without a valuable consideration is not binding, an executory trust, i. e., a promise to create a trust, cannot be enforced, if it be unsupported by a valuable consideration. But if the trust be executed, i. e., completely declared, the absence of a consideration is immaterial and it may be enforced though voluntary. [Atkinson v. Petitioner, 16 R. I. 413; Banking Co. v. Miller, 190 Mo. 640; Leeper v. Taylor, 111 Mo. 312; Lane v. Ewing, 31 Mo. 75.]

The rule invoked by defendants that a promise to pay the debt of another, although in writing, must be founded upon a sufficient consideration, relates to executory contracts and not to executed trusts which, as shown, may be valid though voluntary. Therefore it is immaterial whether there was any consideration moving from plaintiff to James Welch the owner of the land for the execution of a trust in favor of plaintiff. Concede it was voluntary and still the conclusion must follow that Welch could create a voluntary executed trust in favor of his wife's creditor, as well as in favor of any other person to whom he was under no legal or moral obligation.

We shall pass over without discussion the question of whether the conveyance of her inchoate right of dower was a sufficient consideration for the creation of a trust in favor of her creditors. That question would be of vital importance were we dealing with an executory trust but is unimportant here.

The provision in the trust deed requiring the trustee "to pay all debts now due and owing by said parties of the first part or either of them, in whatsoever form said debts are now in," created a trust in favor of plaintiff, a creditor of Mrs. Welch, which he is entitled to have enforced in an equitable action.

We are not impressed by the argument that the judgment recovered by James Welch in the suit at law prosecuted by plaintiff to recover judgments on

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the account, is a bar to the maintenance of this action. It suffices to say there is a lack of identity of subject-matter. In the suit at law plaintiff endeavored to obtain a personal judgment against the husband on an alleged debt and the judgment rendered exonerated him from such liability. The present action is one in equity not to enforce a personal demand against him but to charge a trust fund with the payment of a matured interest of a *cestui que trust* in that fund. The subject of the present suit could not have been litigated in the law case and, that being true, the judgment in question cannot be considered as an adjudication of the present issues. It follows that the judgment must be reversed and the cause remanded with directions to enter a decree for plaintiff in accordance with the views expressed.

All concur.

ALMA A. PERRY, Respondent, v. THE CITY OF SEDALIA, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **NEGLIGENCE: Proximate Cause: Hole in Sidewalk.** The plaintiff seeks to recover damages for injuries, received when she stepped into a hole in the sidewalk of the city of Sedalia. The hole was at one side of a water meter box, having been there for five days, and the sidewalk was only partially lighted on account of the shade trees. The hole had been temporarily repaired the day of the accident. *Held*, that the demurrer to the evidence was properly overruled.

2. **———: Verdict: Substantial Evidence.** If the evidence of plaintiff is substantial the verdict will not be disturbed, because the jury disbelieved the defendant's evidence instead of plaintiff's.

3. **———: Notice to Repair: Prejudicial.** When it is conceded that a party has actual notice in time to make repairs, the evidence on that point even if erroneously admitted would not be prejudicial to that party.

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4. ———: **Misconduct of Counsel: Prejudicial Error.** The statutes provide that an error to be ground for reversal of a judgment must be prejudicial to the party against whom it is committed. Thus a party cannot urge his adversary into an error, and then be heard to complain of that error.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain*, Judge.

AFFIRMED.

W. G. Lynch for appellant.

A. L. Shortridge and *W. D. Steele* for respondent.

JOHNSON, J.—Plaintiff sued the city of Sedalia, a city of the third class, to recover damages she alleges resulted from personal injuries she sustained in consequence of negligence of defendant. The answer is a general denial. The cause is here on the appeal of defendant from a judgment of $750 recovered by plaintiff in the circuit court.

The injury occurred one Sunday night while plaintiff and her husband were returning home from church. They were walking on a brick sidewalk in one of the public streets when plaintiff stepped into a hole in the middle of the sidewalk and sustained the injuries of which she complains. The hole was at one side of the cover of a water-meter box and was about one foot long, five or six inches wide and ten inches deep. It had been caused by the displacement and removal of the top layer of brick in the wall on one side of the meter box pit and had been there since the preceding Wednesday. The street was lighted but owing to the shade trees and other obstructions the defective place was in partial darkness and plaintiff who, as her evidence tends to show, was proceeding in a usual and reasonably careful manner did not see the hole before stepping into it. The mayor of the city introduced as a witness by defendant testified that in the morning

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of the day of the injury he received notice of the defective and dangerous place and immediately ordered the street commissioner to repair it. The latter officer also offered as a witness by defendant testified that early that afternoon he went to the place and repaired the defect by fitting a piece of board in the hole and laying a longer piece across the top. He made the repairs in this temporary manner because it was Sunday and he intended to make more substantial repairs the next day. If the temporary repairs were made as he states, every vestige of them had disappeared before the injury, according to the evidence of plaintiff and the defect was in the same condition it was when he attempted to remedy it.

The first contention of defendant is that the court erred in refusing a peremptory instruction asked by defendant at the close of the evidence. Counsel argue that plaintiff failed to prove that her fall was caused by stepping into the hole and, therefore, failed to prove that the alleged negligence was the proximate cause of her injury. The argument is based on the following testimony of plaintiff elicited by defendant on cross-examination:

"Q. Did your foot go into the hole? A. I don't know whether it did or not. I think it did."

Plaintiff did not see the hole which all of the evidence shows was there and, quite naturally, did not know what caused her to trip or stumble and fall. She received a severe sprain of her left ankle and being in great pain did not stop to ascertain the cause of her injury. But all of the evidence relating to the subject shows that she fell at the place of the defect and a witness who was walking immediately behind her testified that she stepped into the hole. Of course the burden is on plaintiff to show that her injury was caused in the manner alleged in her petition and this she has done by both direct and circumstantial evidence of the strongest character. The fact that she

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did not know of her own knowledge the cause of her injury, cannot be construed as an admission against interest or as conclusive evidence that she was not injured in the manner alleged in her petition. It would be a strange rule that would require a person injured by the negligence of another to know the precise cause of his injury on pain of losing his right to recover damages. We hold that plaintiff fully sustained her burden of proof and that her evidence presented the issue of the proximate cause of her injury as one of fact for the jury to determine.

Further defendant argues that the demurrer to the evidence should have been sustained for the reason that defendant through its street commissioner immediately repaired the defect on the receipt by defendant of notice of its presence in the sidewalk. The duty of defendant was to exercise reasonable care to discover the defect and on receiving either actual or constructive notice of its existence, to use reasonable diligence and care to remove the danger from the way of pedestrians rightfully using the sidewalk. The issue of reasonable care in discovering the defect is removed from the case by the admission of the mayor and street commissioner that they had actual knowledge of it and did make repairs some hours before the injury. It is not claimed that defendant did not have a reasonable time for making suitable repairs but that it did make safe the unsafe place with temporary but sufficient repairs.

We agree with defendant that its evidence discloses facts which, if true, would preclude a recovery by plaintiff. If the street commissioner repaired the place that afternoon in a way to make the sidewalk reasonably safe, the fact that the repairs were temporary would be immaterial and the case would afford no room for the inference of a lack of reasonable care on the part of defendant.

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But the weakness of defendant's position lies in the assumption that its evidence on this issue should be given conclusive effect. In view of the facts that the testimony of the street commissioner is unsupported by any other evidence and is contradicted by other facts and circumstances in evidence, the jury were entitled to disbelieve him and to infer either that he did not repair the place at all, or if he did, that he failed to make reasonable use of his opportunity and means to put it in a reasonably safe condition for travel.

The demurrer to the evidence was properly overruled.

Next it is urged that the verdict was excessive and should be denounced as the result of passion and prejudice. The evidence of plaintiff tends to show that she sustained a severe and very painful injury to her ankle, accompanied by nervous shock, and that she had not recovered at the time of the trial. The extent of her injuries and their effect upon her were closely contested issues at the trial, and the evidence of defendant accuses plaintiff of wilfully magnifying her damages. But all the evidence presents the issues of the credibility of plaintiff and her witnesses and the weight to be given their testimony as issues of fact, and since the evidence of plaintiff is substantial, we perceive no occasion for interfering with the verdict because the jury disbelieved defendant's evidence instead of plaintiff's. On the hypothesis of facts presented by the evidence of plaintiff the assessment of damages was not excessive.

Point is made of error in a ruling of the court on evidence relating to the giving of notice to defendant of the existence of the hole; but since it is conceded defendant had actual notice in time to have repaired the place, we do not see how that evidence, if erroneously admitted, could have been prejudicial to defendant.

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Finally, it is argued that we should reverse the judgment and remand the cause on account of misconduct of one of plaintiff's attorneys in his argument to the jury. The remark of the attorney thus called in question would have been improper had it not been invited by counsel for defendant. Certainly a party cannot urge his adversary into error, as was done in this instance, and then be heard to complain of that error. The statute provides that error to be ground for the reversal of a judgment must be prejudicial to the party against whom it was committed, which means, of course, that he must be innocent of participation in the wrong that injured him, else he can have no just ground of complaint.

Finding no prejudicial error in the record, the judgment is affirmed.

All concur.

MAT MARSHALL, Respondent, v. JOHN N. TAYLOR, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **NEGLIGENCE: Automobiles: Compromise.** Plaintiff seeks to recover damages for personal injuries inflicted on him, and damages to his horse, wagon, and harness. The defendant's automobile was driven by his son, the only occupant of the car, when he came up behind the plaintiff's wagon, and in attempting to pass, the right rear wheel of the car struck the left front wheel of the wagon. Plaintiff was thrown out and injured, and his horse ran away, damaging the wagon and harness. The trial court allowed the plaintiff's counsel, over the defendant's objection, to state an offer of compromise in the presence of the jury. *Held*, this was reversible error.

2. ———: ———: ———: **Road Rules: Issue of Fact.** The question as to whether or not the plaintiff violated the road rules as provided in the Laws of Missouri, 1911, page 327, is an issue of fact and not of law.

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3. ———: **Master and Servant: Burden of Proof.** When a party contends that his own son was not acting as chauffeur for him at the time the accident occurred, but had become *sui juris*, the burden rests upon that party to show that he was not his servant.

4. ———: **Evidence: Witnesses.** The question of whether the autoist had sufficient space in which to execute the attempted movement and exercised reasonable care were issues of fact raised by the pleadings and evidence and the witnesses should not have been permitted, as they were, to invade the province of the jury in solving them.

5. ———: ———: **Efforts of Compromise: Public Policy.** All confidential overtures of pacification, or other propositions between litigating parties, stated to be without prejudice, are excluded on grounds of public policy.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,* Judge.

REVERSED AND REMANDED.

N. T. Gentry for appellant.

Stephens & Collier for respondent.

JOHNSON, J.—This is an action, commenced March 2, 1912, in the circuit court of Boone county for the recovery of damages plaintiff alleges he sustained in consequence of a collision between his wagon and an automobile owned by defendant. The petition alleges that the collision was due to the negligence of defendant's son who was operating the automobile and that plaintiff's damages resulted from personal injuries inflicted on him and from injuries to his horse, wagon and harness. The answer in substance is a general denial and a plea of contributory negligence. A trial of the cause to a jury resulted in a verdict and judgment for plaintiff and after his motions for a new trial and in arrest of judgment were overruled, defendant brought the case here by appeal.

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Plaintiff, a negro, was driving east on Broadway, a paved street, and was approaching the intersection of Third street when defendant's automobile, driven by his son, who was the only occupant, overtook plaintiff's wagon and in passing collided with it. There was a deep snow on the street but there was a well-beaten wagon path near the middle of the pavement and plaintiff kept his horse and wagon in the beaten road and did not attempt to turn out towards the right though warning of the coming of the automobile was given by the sounding of the horn. Plaintiff states he did not hear the horn on account of the noises made by his wagon and did not know of the approach of the automobile until the instant of the collision. The driver of the car, when he overtook the wagon, attempted to pass around it on the north side and in completing the movement turned into the beaten road ahead of the wagon to avoid, so he says, a pile of stones on the north side of the pavement. He cut in too close and the right rear wheel of the car struck the left front wheel of the wagon. Plaintiff was thrown from his seat into a pile of snow. His horse ran away and smashed the wagon and damaged the harness.

Defendant introduced in evidence an ordinance of the city prescribing "rules of the road." This ordinance contains the provisions of paragraph 3, section 8, of an act relating to motor vehicles, passed by the Legislature in 1911 (see Laws of Missouri, 1911, page 327). The rules thus prescribed are as follows:

"Whenever a person operating a motor vehicle shall meet in a public highway any other person riding or driving a horse, or horses, or other animals of any other vehicles, the person so operating such motor vehicle shall reasonably turn the same to the right of the center of such highway so as to pass without interference. When any such person so operating a motor vehicle shall overtake any such horse, animal

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or other vehicle, the rider or driver of such horse, animal or other vehicle, shall, as soon as practicable, turn aside to the right so as to allow free passage on the left hand side. Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right and pass to the right of such intersection when turning to the left."

Counsel for defendant argue that the demurrer to the evidence asked by defendant should have been sustained on the ground that the violation of the statute and ordinance by plaintiff which, obviously, was at least a contributory cause of his injury, precludes his recovery notwithstanding the driver of the car may have been negligent in the manner in which he attempted to pass around the wagon. We think the issue of whether or not plaintiff was guilty of an infraction of these rules of the road or was negligent in not turning to the right to allow the car to go by, is presented by his evidence as one of fact for the jury to determine. The inference is reasonable that his wagon which was old and dilapidated made a great deal of noise which with the added noise of the wheels crunching in the snow prevented him from hearing the horn, if, in fact, it was sounded. The statute contemplates and requires the driver of the wagon not to keep looking back in anticipation of being overtaken by a motor vehicle traveling in the same direction, but to act with reasonable diligence to give free passage to such vehicle on being informed of its approach behind him. If plaintiff did not know of the approach of the car and was in a situation where such lack of knowledge was compatible with due care on his part, he should not be held guilty of a violation of the statutory rules of the road or of contributory negligence. We repeat that the characterization of his

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conduct is presented by his evidence as an issue of fact and not of law.

That the evidence of plaintiff tends to accuse the chauffeur of negligence is not a debatable proposition. Realizing, as he did, that plaintiff was not going to turn to the right, he had no business running into a place where a collision with the wagon was unavoidable. The obstruction to his course, offered by the pile of stones in the street, gave him no excuse for injuring plaintiff. There was nothing to prevent him from stopping his car; he was not compelled to turn in ahead of plaintiff when he could see or should have seen that such movement could not be executed in safety. The fact is that he needlessly and heedlessly subjected plaintiff to risk of injury on the mere chance that he might be able to clear the wagon on "a close shave." To speculate and sport with the safety of another in such fashion is negligence, to say the least.

But it is argued that defendant should be exonerated from liability for the negligence of the chauffeur for the reason that the latter was using the car for a purpose of his own and not as the servant of defendant. The evidence on which this position is founded consists of the testimony of the chauffeur who, as stated, is the son of defendant. The automobile was kept by defendant for the use and pleasure of his family of which it appears the son, who was twenty-one years old, was a member. The young man was not employed by his father as a servant for hire to run the car, but had performed the duties of a chauffeur for the family and was permitted to use the machine for his own pleasure and convenience as well as in the service of other members of the family. He testified: "I was running the car myself and came down town on it to keep from walking; nobody was with me." He does not explain whether he came down town on his own affairs or on some business of his

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father or of some other member of the family for whose use the machine was provided.

In the recent case of Dailey v. Maxwell, 152 Mo. App. 415, we dealt with a case where the minor son of the owner of the car was the family chauffeur but on the occasion in question was using it for his own pleasure. We recognized the rule that the owner of the automobile, who was not present at the injury, cannot be held liable except it be shown that the person in charge not only was his servant and agent but at the time was engaged in the business of his service. But further we held that the use of the car by the minor son for his own pleasure and with the consent of his father, the owner, was one of the uses for which the vehicle was kept and, therefore, was a part of the service for which the owner had authorized the boy to run the car as his servant.

The only difference between that case and this is that here the young man had attained his majority, was *sui juris,* and his father owed him no duty of parentage and, of course, was under no obligation to provide him with means of pleasure and recreation. We do not think this fact is determinative of the question of defendant's liability. The real question at issue is not that of the legal duty defendant owned his son, but is whether or not the son was the agent of his father in running the car. Frequently fathers continue not only to support their children after the latter have become *sui juris,* but to provide them, as members of the family, with the means of recreation and pleasure. This car was provided by defendant for the use of his immediate family. He contemplated and intended that his son should enjoy it in common with other members of the family. When in such use it was as much in his service as it would have been had it been occupied by his wife, his daughter, his mother or his guest. We conclude that the young man was not a mere servant using his master's vehicle for

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his own purpose but was the agent of his father operating the car for one of the purposes of its intended use.

Aside from what we have just said, we may add that in proving the car was the property of defendant in charge of his chauffeur, the evidence of plaintiff tends to show that the chauffeur was acting in the line of his employment. As is well said by the St. Louis Court of Appeals in Shamp v. Lambert, 142 Mo. App. l. c. 575:

"The admission of the defendant to the effect that it was his automobile and that his chauffeur was in charge of the same at the time of the injury, of course tends to prove that the chauffeur was acting in the line of his employment, for if he was defendant's chauffeur then his duties were to operate defendant's automobile. We believe this testimony is sufficient for the prima facie purposes of the case; for how could plaintiff prove the particular trip to the station by the chauffeur and automobile was authorized by defendant? If, as a matter of fact, the chauffeur was not acting for the defendant at the time, the burden rested with him to show to the contrary, after plaintiff had shown so much."

The mere statement of defendant's son that he was using the car because he did not wish to walk should not be accorded any greater evidentiary weight than that of raising an issue of fact with the evidence of plaintiff which, as stated, tends to show that the car was in the service of defendant at the time of the injury. The demurrer to the evidence was properly overruled.

During the trial counsel for plaintiff, over the objections of defendant, was permitted to ask questions on the direct examination of witnesses of which the following is a fair sample: "Q. At this point of collision, was there room for him (the autoist) to have passed, (plaintiff's wagon) using ordinary care,

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on the north side?" The answers of the witnesses were in the affirmative. These questions should not have been allowed. They called for mere opinions about a matter that could not properly be considered a subject for opinion evidence. The questions of whether the autoist had sufficient space in which to execute the attempted movement and exercised reasonable care were issues of fact raised by the pleadings and evidence and the witnesses should not have been permitted, as they were, to invade the province of the jury in solving them. The admission of the evidence was prejudicial error. [Thompson v. Livery Co., 214 Mo. l. c. 499; Kallher v. Parker, 155 Mo. App. l. c. 375; Heberling v. Warrensburg, 133 Mo. App. l. c. 547; Lawson on Expert and Opinion Evidence, p. 1; 1 Greenleaf on Evidence, sec. 441.]

When plaintiff was on the stand his counsel asked him questions about an attempt defendant had made to compromise the case. Defendant objected and the court required plaintiff's counsel to state outside of the hearing of the jury just what he desired to prove. Wherepon counsel offered to prove "that a lawyer by the name of Daily, some two weeks prior to the trial of this case, went down to the home of plaintiff and wanted plaintiff to come to his office the next day; that plaintiff went to his office and there Daily wanted to pay him some money, if plaintiff would dismiss his case, and then and there pulled out a pint of whiskey and gave him a drink, and before leaving there, tried to get plaintiff to drink some more whiskey. That plaintiff was then taken to defendant's music store and there Daily gave the plaintiff another drink of whiskey and while there the defendant offered to give plaintiff a check for twenty-five dollars and take his receipt in full payment for any and all injuries on the account of this accident."

This was a clear attempt to prove an offer of compromise and the court properly sustained defendant's

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objection but followed this correct ruling by one permitting counsel for plaintiff, over the objection of defendant, to restate the offer in the presence and hearing of the jury. The court again sustained the objection to the evidence on the ground that it was an attempt to prove an offer of compromise as, obviously, it was.

The law strongly favors the settlement of disputes outside of court and to that end seeks in every way to encourage disputants to get together and compromise their differences. Courts realize that often a party to a controversy, though confident of the justice of his position, would rather buy peace than engage in litigation. But no prudent man would dare approach his adversary with an offer of compromise if he thought his adversary would be allowed to take advantage of his offer in court and exploit it as a confession of weakness. To allay such fear the courts have always denounced every attempt to prove an offer of compromise or to get before the jury the fact that such offer was made.

"The rule of law is that all confidential overtures of pacification, or rather propositions between litigating parties, stated to be without prejudice, are excluded on grounds of public policy; and the reason of the rule is that, unless so excluded, it would be difficult to take any step towards an amicable compromise or adjustment." [Ferry v. Taylor, 33 Mo. l. c. 333; Smith v. Shell, 82 Mo. l. c. 220; Sterrett v. Railroad, 225 Mo. l. c. 115; Huetteman v. Viesselman, 48 Mo. App. l. c. 589; Mill Co. v. Ins. Co., 59 Mo. App. 204; Rusher v. Aurora, 71 Mo. App. l. c. 424; Herman v. Railroad, 77 Mo. App. 380; Cullen v. Insurance Co., 125 Mo. App. 412.]

There was no good reason for permitting plaintiff to repeat his offer in the hearing of the jury. It was already in the record and plaintiff's exception to the ruling excluding the offer also was in the record.

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Plaintiff could have had no other motive in repeating it than that of advising the jury that defendant had been trying to compromise the case. He wished to prejudice the jury against defendant and we must assume that his desire was accomplished and that the jury were duly impressed to the injury of defendant. Trial courts should sternly repress such efforts to get improper and prejudicial matter to the jury under the guise of an offer of proof which, if made to the record, should be made out of the hearing of the jury.

For these errors the judgment is reversed and the cause remanded. All concur.

STATE OF MISSOURI, Respondent, v. BENTON WHITE, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **CRIMES AND PUNISHMENTS: Justices of Peace: Intoxication.** The defendant, a justice of peace, was tried and convicted under Sec. 10203, R. S. 1909, which provides a punishment for a public officer, who becomes so intoxicated that he is incapacitated to perform any official act at the time and in the manner required of him in the discharge of the duties of his office. It is *held* the evidence shows beyond question that the defendant was not so disabled at the time charged and the trial judge erred in not peremptorily instructing the jury to return a verdict for the defendant.

2. ———: ———: ———: ———. It is not a crime for an officer to use intoxicating liquors, but it is a crime for him to be intoxicated, while in the performance of any official duty, or to be incapacitated by intoxication for the discharge of any official duty at a time, and in a manner, required of him by law.

3. ———: ———: ———: **Incapacitated.** The term "incapacitated," as used in the statute, means the inability on account of intoxication, properly, to perform an official act when it should be performed.

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Appeal from Boone Circuit Court.—*Hon. D. H. Harris,* Judge.

REVERSED.

Gillespie & Conley and *J. L. Stephens* for appellant.

E. C. Anderson and *W. H. Sapp* for respondent.

JOHNSON, J.—On information of the prosecuting attorney, defendant, a justice of the peace in Boone county, was tried and convicted of a violation of section 10203, Revised Statutes 1909, which provides: "If any public officer . . . shall be intoxicated while in the performance of any official act or duty, or shall become so intoxicated as to be incapacitated to perform any official act or duty at the time and in the manner required of him in the discharge of the duties of his office, he shall be deemed guilty of a misdemeanor in office and punished by imprisonment in the county jail not exceeding six months, or by a fine of not less than fifty dollars, or by both such fine and imprisonment, and if there be no provision made by law for the removal from office of such officer by impeachment, the court shall adjudge the defendant to have forfeited his office," etc.

It will be observed there are two clauses in this section. Under the first it is made an offense for an officer to be intoxicated while in the performance of any official duty, while under the second the offense lies in the officer being so intoxicated as to be incapacitated to perform any official act or duty when properly called upon to do so. [State v. Taylor, 93 Mo. App. 327.] The offense charged in the information is under the second clause and, consequently, the burden is on the State to prove beyond a reasonable doubt that defendant not only was intoxicated at the time he

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was required by the duties of his office to perform an official act, but was so intoxicated that he was incapacitated to perform such act properly. The learned trial judge thought the evidence adduced by the State sufficient to carry the case to the jury and a verdict of guilty was returned in which the punishment was assessed at a fine of fifty dollars. In the judgment rendered on this verdict defendant was sentenced to pay the fine and was removed from office

The facts of the case are as follows: Defendant, who is over seventy years old, has been a justice of the peace in Rocheport, Boone county, many years and has been a good officer. Many of the leading members of the Boone county bar appeared as witnesses and all unite in saying he is a good man and has faithfully and efficiently discharged the duties of his office. He is too fond of "John Barleycorn" and has been known to be drunk but he always made it a point to be sober when holding court or performing other official duties. One evening a negro, without permission, rode away on a horse belonging to a liveryman in Rocheport and that night was arrested by the marshal at the instance of the liveryman and was lodged in the town calaboose. About seven o'clock the next morning which was October 14, 1911, the liveryman went to defendant's home to procure a warrant for the arrest of the negro. The liveryman testified in part:

"Q. Did you ask for a warrant for his arrest? A. I told him I wanted to get out the papers to arrest the negro. . . .

"Q. Where was the defendant when you saw him? A. He was at the house in bed.

"Q. What clothing, if any, did he have on? A. He had his pants on—I don't know whether he had his coat on or not.

"Q. Did he have on his shoes? A. I don't know

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whether he did or not—I would not say. I know he had his pants on.

"Q. Did you or not get a warrant? A. No, sir.

"Q. Why not? A. It looked like I was not able to get one. He told me 'I will hunt up my papers and come down town after awhile,' and I come on out.

"Q. What was his condition—drunk or sober? A. I thought he was drunk. He had the trembles—and I made the remark that he could not navigate."

Later in the morning defendant did go "down town" to attend to the business but in the meantime the liveryman changed his mind, decided not to prosecute the negro and sent an oral mesage to that effect to defendant.

The prosecuting witness, a merchant of Rocheport, apparently on unfriendly terms with defendant, testified that he saw defendant twice that morning, first, when he passed defendant's house while the liveryman was there, and later when defendant passed in front of his store. He saw defendant the first time through the door which was open and his "impression is that he was drunk."

On the other hand defendant testified he had not drunk any intoxicants that morning, was not under the influence of intoxicants in any degree and that he was not in bed when the liveryman called. He states his wife was ill; that he had lost sleep in taking care of her and that he was in a nervous condition when he arose that morning. He was engaged in the preparation of breakfast and on learning the object of the liveryman's visit, stated he would go "down town" as soon as his duties at home would permit and would then attend to the business. An hour later he left home for that purpose and was informed on the street that the liveryman had decided not to prosecute the negro.

There are other facts in the record but those stated control the disposition of the case.

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As is said in the case of State v. Taylor, supra, an officer may get drunk and not violate the statute. The purpose of the law is the maintenance of the public service on a plane of decency and efficiency by placing a ban on a practice that would be detrimental to the interests of good government. But there is no thought expressed in the statute of a legislative purpose to interfere with the private lives of public officers. It is not a crime for an officer to use intoxicating liquors but it is a crime for him to be intoxicated while in the performance of official duty or to be incapaciated by intoxication for the discharge of any official duty at a time and in a manner required of him by law.

Though the liveryman called on defendant at a time outside of usual business hours, the duties of defendant's office included that of issuing warrants for the arrest of lawbreakers at all hours of legal days and we are willing to concede it was the duty of defendant to be in condition to attend to the request of the liveryman at the time it was made. But the weakness of the case made out by the State lies in the complete failure of the evidence to show that defendant was incapacitated by intoxication at that time. The charge is that he was so incapacitated and the State must prove that charge. The evidence tending to show he was under the influence of intoxicants is weak and unsatisfactory, but conceding for argument, that it possesses enough probative weight to raise an issue of fact, it tends to show not that defendant was not in condition to prepare and issue the necessary papers but that he was in full possession of his faculties and could and would properly perform the act at a convenient and proper time. There was no occasion for extreme haste. The negro was in durance and an hour's delay in issuing the papers would have been immaterial. Defendant talked and acted in a reasonable and rational manner and proceeded with

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reasonable expedition to discharge his duties towards the case. By the term "incapacitated" as used in the statute is meant the inability on account of intoxication properly to perform an official act when it should be performed. The evidence shows beyond question that defendant was not so disabled at the time the warrant should have been issued and the learned trial judge erred in not peremptorily instructing the jury to return a verdict for defendant.

The judgment is reversed. All concur.

CITIZENS NATIONAL BANK, Plaintiff, v. WILLIAM McKENNA, Appellant, and THOMAS AUSTIN, Administrator, Respondent.

Kansas City Court of Appeals, February 3, 1913.

1. **GIFT: Intention: Delivery.** In order that there may be a valid gift of personal property, in addition to an intention to give, there must be an actual delivery.

2. **TRUST: Personal Property: Donor: Trustee.** A trust in personal property may be created verbally, nor is there any legal objection to the donor making himself the trustee.

3. **———: ———: Change of Title: Executory.** In order to transfer money from the owner into a condition of trust for another, there must be a present and permanent change of title. It cannot be executory. Mere intention for future consummation is not sufficient.

4. **———: ———: Deposit in Bank: Possession.** Where a person deposited money in a bank, taking a certificate of deposit payable "to himself or William McKenna," his nephew, with the statement, frequently made, that it was to be McKenna's if he, the depositor, died or anything happened to him, he keeping possession thereof until his death; it was *held* that this did not create a trust in McKenna's favor, and that the depositor's administrator was entitled to the money. Cases distinguished.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

AFFIRMED.

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H. K. White and *John L. Schmitz* for appellant.

P. W. Harding and *A. W. Mullins* for respondent.

ELLISON, J.—The Citizens' National Bank of Chillicothe, Missouri, held $3500 which had been deposited by John McKenna. He died shortly after making the deposit and his administrator and William McKenna, a nephew, each claimed the money. The bank brought action in equity asking that the claimants be required to interplead for the money. They appeared and made their claim in due form. The result in the trial court was in favor of theadministrator and William appealed.

Deceased, John McKenna, was an old man possessed of considerable property and without a family of his own. He died April 14, 1910. Near three weeks prior to his death, on March 26, 1910, he deposited the above sum in the bank and received the following certificate of deposit, payable to himself or interpleader William McKenna:

"The Citizens' National Bank of Chillicothe.

Chillicothe, Mo., Mar. 26, 1910. $3500.00

John McKenna has deposited in this Bank Thirty-five hundred and no/100 dollars, payable in current funds to the order of himself or Wm. McKenna, six months after date, on return of this Certificate properly endorsed, with interest to maturity only at the rate of 3 per cent per annum.

This Certificate of Deposit is not subject to check and draws no interest after maturity.

R. F. McNally, Cashier."

Before this, he had a time deposit of $2000, drawing interest, and a checking account of $1500. At the time of the deposit we have just set out, he came to the bank in company with William, whom he introduced to the cashier. He stated to the latter, "I have

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$2000 in a certificate and $1500 in my checking account. I want it put in a certificate to bear interest payable to my nephew William McKenna, in the event I die or anything happens to me." The cashier's testimony continued as follows: "I said 'I can make the certificate to you or Wm. McKenna.' I said 'Is that satisfactory?' and he said, 'Yes; I want his name on the certificate.' I asked him how he was feeling and he said he was a candidate for the 'cemetery,' and I noticed it because in my relations with him, it was the first time I heard him speak of dying. I put the certificate in an envelope and he stayed around the bank about an hour and I took him to the hospital in my automobile with his nephew. That was the last time I ever saw him and he died fifteen days later."

On further examination the witness repeated that deceased said that he "wanted the money to go to William in the event of his death or anything happening to him."

During this conversation and transaction William said nothing. Deceased kept the certificate in his possession up to his death, without endorsement or change of any kind. There was other evidence tending to show that he intended the money for William. There was other evidence showing that a few days after the deposit, deceased escaped from the Sisters' Hospital in Chillicothe, where he was staying, having evidently become deranged. He was taken back. So there was evidence that he had $2375 in a glass jar buried under the floor of his cabin on his farm in Linn county, of which he told his nephew, John P. McKenna, and asked him to go and get it. There was some question made as to how this was accounted for. But we do not see that these matters can affect the question which finally determines the case.

Interpleader McKenna, realizing that to constitute a gift *inter vivos,* there must have been, added to an intention to give, an actual delivery of the gift

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(Harris Banking Co. v. Miller, 190 Mo. 604; Godard v. Conrad, 125 Mo. App. 165), makes no claim on that theory. His stand is that there was a trust created in his favor, the deceased being both trustor and trustee of the fund. There is no legal objection to a trust in personalty being created in parol; a writing only being required for realty; nor is there any legal requirement that a third party shall be the trustee—the donor may make himself such. [Mize v. Bates Co. Nat. Bank, 60 Mo. App. 358.]

The question therefore is, did the acts of deceased make the deposit a trust fund for William with himself as the trustee in possession of the fund? In order to transfer the money from the owner into the condition of trust for another, there must be a present and permanent change of the title. If the trustor is himself the trustee, the title must have passed from him, he thenceforth holding the trust property for the beneficiary.

It seems clear to us that no such disposition was made of the money in controversy, and that no intention of deceased to make such disposition was shown. He said he wanted William to have it *if he died,* or anything happened to him; these expressions doubtless meaning the same thing. The circumstances rebut an intention for a present parting with the title. They show rather a reservation of his own ownership and control; and without doubt deceased considered the money in his power and ownership, if he should conclude to use it before he died. The Supreme Court, in quoting from Stone v. Hackett, 12 Gray, 227, said that equity would not regard a transaction as creating a trust so long as it remains executory. [Estate of Soulard, 141 Mo. l. c. 660.] The property must have passed out of the trustor so as to effectually pass the title, equitable though it be, to the *cestui que trust.* [Ib. 662.] And so the law is stated in Godard v. Con-

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rad, 125 Mo. App. 165, 175. In support of like suggestions the Supreme Court of Michigan said: "It (the declaration of trust) must be such that from the time it is made the beneficiary has an enforcible equitable interest in the property, contingent upon nothing except the terms imposed by the terms of the declaration of the trust itself. If Mrs. Turner, in her lifetime, had declared her intention to sell and transfer these notes, could plaintiff have maintained an injunction to restrain such action, or, if she had actually sold them, could plaintiff have maintained trover against her for their value?" [Botsford v. Burr, 141 Mich. 370.]

The form of the certificate, as well as his expression in directing its issuance, shows a testamentary disposition was intended, a disposition only to become consummated at his death without other direction; a condition incompatible with a trust. The words of the certificate, to pay "to the order of himself or William McKenna," meaning that if he died William would then become the owner of it and could cash it.

It is not a hazardous statement to say that if deceased had not died for several years and in the meantime had cashed the certificate and used the fund, that no one would have been found to say that William had any claim upon it.

Reliance is placed on the case of Harris Banking Co. v. Miller, 190 Mo. 640. It is vitally dissimilar in essential facts. There as here, the dispute was over a certificate of deposit. The depositor took a certificate in his own name and then made a written unconditional and absolute indorsement to the claimant and delivered it to her to read, declaring it was hers, and afterwards asking her to take charge of it, which she refused to do and he continued to keep it for her. The opinion is an exhaustive discussion of the subject and approves of the law as we have herein stated it. There the creation of the trust "was in the present

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tense" and "a completed transaction;" "not that he intended to give it to her, but it was now hers, subject only in the right of himself to receive the interest thereon;" and that as to "this fund he had made a final disposition of it;" (l. c. 669, 670.) And this, in effect, is the ruling in Godard v. Conrad, supra.

Nor is this case like that of Mize v. Bates Co. Nat. Bank, 60 Mo. App. 358, decided by this court. There, a certificate of stock was surrendered to the bank by the father and three new ones issued, one to each of three children, and the dividends were credited by the bank to the father "as trustee" for the children.

It follows from the foregoing considerations that we approve the conclusion of the trial court and hence affirm the judgment. All concur.

ZOULA ROBINSON et al., Appellants, v. NEW YORK LIFE INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, February 3, 1913.

1. **LIFE INSURANCE: Change of Beneficiary: Reservation.** The unconditional beneficiary in a policy of life insurance has a vested interest therein which cannot be changed by the insured. *But* if the right to change the beneficiary is reserved in the policy, he may make the change.

2. **———: ———: Exemption: Statute.** Sec. 5854 R. S. 1889, provides that if a person takes out a policy of life insurance payable to a married woman, it shall inure to the separate benefit and use of such woman and her children free from the claims of the creditors of the husband or other person taking out the insurance; and that if such woman should die before her husband, the policy should inure to the children free from claims of creditors, "any technical words or phrases in the policy to the contrary notwithstanding." *Held*, that such section was a statute of exemption and that it did not prevent the reservation in the policy for a change of beneficiary.

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Appeal from Vernon Circuit Court.—*Hon. B. G. Thurman,* Judge.

AFFIRMED.

M. T. January and *S. A. Wight* for appellants.

J. H. McIntosh, Irwin Gordon, and *Scott & Bowker* for respondent.

ELLISON, J.—This action is based on a policy of life insurance. The judgment in the trial court was for the defendant.

Plaintiffs are the children of Almond B. Cockerill, and it appears from an agreed statement of facts that the defendant, in January, 1899, issued to him a policy of life insurance for ten thousand dollars, payable to his wife, or in the event of her dying before him, to his executors, administrators or assigns, "or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of the company in the city of New York." The policy contained the further provision that the insured could at any time "change the beneficiary or beneficiaries by written notice to the company at its home office," etc.

On the 7th of March, 1903, Cockerill changed the beneficiary from his wife to these plaintiffs, his children. About two years afterwards, on the 20th of March, 1905, he changed from the latter beneficiaries to his executors, administrators and assigns.

Cockerill's wife died in July, 1905. In August, 1910, he and the defendant agreed that the policy should become "a paid-up policy for $1348." In about a year thereafter he died. The defendant then paid the latter sum to his administrator.

Plaintiffs' claim is that Cockerill's wife and children became possessed of a vested interest at the de-

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livery of the policy, and that the changes of beneficiaries were void, being contrary to the statute, section 5854, Revised Statutes 1889, in force at the time the policy was issued. The case depends upon a construction of that section. It reads as follows:

"Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself or by her husband, or by any third person in her behalf, shall inure to her separate use and benefit, and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in such policy, or the proceeds thereof. In the event of the death of such married woman before her husband, the said policy shall inure to the children of such marriage, to the exclusion of creditors and executors and administrators of said husband, any technical words or phrases in the policy to the contrary notwithstanding."

The reasoning in plaintiffs' favor is like this: That the insurance is a Missouri contract and that the insurance laws of Missouri therefore became a part of it (Cravens v. Life Ins. Co., 148 Mo. 583) and that such Missouri law (the above statute) forbids a change of beneficiary; thus leaving the policy payable to the wife and children, or, in case she died, to the children alone.

Defendant agrees that the policy is a Missouri contract and that it embraces the Missouri statute. Defendant concedes that if the policy had been payable to the wife and had not contained a privilege of substituting another beneficiary, her interest would

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have been vested and the change from her therefore void. [U. S. Casualty Co. v. Kacer, 169 Mo. 301; Blum v. Insurance Co., 197 Mo. 513.] In other words, the defendant's position is that when a person is named unconditionally as beneficiary, such person takes a vested interest, which cannot be changed by the insured. But if a right of change is reserved in the policy, such change may lawfully be made. The effect of defendant's position is that the statute is a statute of exemptions and that it was not intended to interfere with the general law as to changes of beneficiaries. That its object was to secure a policy taken out in the name of a married woman, to her separate use for the benefit of herself and children, free from the claim of her husband's creditors; and in case of her death before her husband, to secure it to the children free from the husband's debts.

It is the general law that though a life policy is made payable to a certain person as beneficiary, yet if the right to change the beneficiary is reserved in the policy, it may be done, thereby divesting the original beneficiary. [U. S. Casualty Co. v. Kacer, supra; Blum v. Insurance Co., supra; Nally v. Nally, 74 Ga. 669.] Does the statute nullify or forbid such reservation? Plaintiffs insist that it does. The question was determined by the St. Louis Court of Appeals in Eves v. Woodmen of the World, 153 Mo. App. 247, wherein it was decided that the statute did not interfere with the contractual right of the parties to qualify the interest of the wife.

In the course of the opinion in that case it is pointed out that while the Supreme Court has not construed the statute, it has stated the general law to be that the interest of a beneficiary in a life policy is vested *unless* a right of divestiture is reserved. [Blum v. New York Life Ins. Co., 197 Mo. 513, 523; U. S. Casualty Co. v. Kacer, 169 Mo. 301, 313-317. See, also, remark of GOODE, J., in Diehm v. Insurance Co.,

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129 Mo. App. 256, 262.] The statute does not seem to limit the right of the husband as to the character of the policy. It does not say that any policy taken out by a husband shall inure to his wife. It says that any policy taken out by the husband for the wife shall be hers and the children's, free from creditors. The statute does not contain any words of restriction on the right to make the wife a conditional beneficiary, that is, a beneficiary unless another is substituted. In the Eves case, Judge CAULFIELD said: "There is no attempt disclosed to vary the terms of the contract of insurance or to derogate from the right to contract freely with regard to the beneficiary. On the contrary, before the policy inures it must be *expressed* to be for the benefit of the married woman. That is, the insured and insurer must first of their own free will make their contract so that it will be expressed to be for her benefit. They may omit her altogether if they desire; or they may give her an interest only in common with others. Their power in that respect is left general and unrestricted. Being so, it includes the power to make a qualified appointment and to reserve the power to revoke and to substitute."

Plaintiffs lay much stress on the concluding clause of the last sentence of the section, providing that if the wife died before the husband, the policy should inure to the children to the exclusion of creditors, etc., "any technical words or phrases in the policy to the contrary notwithstanding." We think that clause finds its only application to the sentence in which it appears. It seems not to apply to or affect any other part of the section. The Legislature, by an expression indicating such intention, could have forbidden a change though the right were reserved in the policy; but it has not done so by that clause. That clause has not the breadth of application to other parts of the statute as the clause in section 5858, Revised Statutes 1889, referred to in Smith v. Life Ins. Co.,

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173 Mo. l. c. 340, 341. Plaintiffs insist that an insured could have reserved in the policy a right to change the beneficiary from the wife, under the general law, as it existed before the statute was passed; and that if he may still do so, the enactment of the statute accomplished nothing. In this plaintiffs omit to notice that the prime object of the statute is exemption. It was not the object of the statute to command a provision for the wife. Its object was to save from creditors what the husband might choose to provide for her.

But here again plaintiffs insist that the proceeds of a policy payable to the wife was her separate property, exempt from execution under other statutes, and that therefore the purpose of exemption ought not to be considered as the purpose of the Legislature in enacting the statute under consideration, as it was altogether unnecessary. However this may be, the necessity for or the congruity of statutes is not a safe guide in construction. It is not infrequent that the same thing is comprehended in different statutes; and it is not uncommon to find in the statute the existing common law enacted into statutory law.

Again, plaintiffs say their construction of the statute is borne out by the action of the Legislature found in the revision of 1899, section 7895, carried into the revision of 1909 as section 6944, amending the statute as it was when this policy was issued. The latter section, besides other amendments, gives the insured husband the right to change beneficiaries if they shall become divorced. And plaintiffs ask, why give the right if they become divorced unless it was the understanding that without that right was granted, it would not exist? The answer is that the amended statute grants the right in cases where no reservation for a change had been made in the policy. As to such, as we have seen, no change could be made prior to this amendment.

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A satisfactory construction of the statute is difficult, but feeling that the St. Louis Court of Appeals has given it the proper solution in the Eves case, we defer to the views as therein expressed.

The judgment is affirmed. All concur.

EFFIE MITCHENER, Respondent, v. R. G. FRAZER and ANNA B. FRAZER, Appellants.

Kansas City Court of Appeals, February 3, 1913.

1. **HUSBAND AND WIFE: Agent: Loan: Gift.** A wife's authority to her husband to act as her agent to loan the money on notes and to collect the loans, is not authority to make a gift of the money or the notes to their daughter.
2. **GIFT INTER VIVOS AND CAUSA MORTIS: Evidence: Conjecture.** While evidence of a gift *inter vivos* need not be so conclusive as that of a gift *causa mortis*, yet it should be sufficiently definite and certain to place the transaction beyond mere conjecture.
3. ———: ———: ———: **Case not fully developed: Remand.** Where a plaintiff fails to make out a satisfactory case but yet it appears probable that the issues have not been fully developed, the court may remand for a new trial instead of reversing outright.

Appeal from Benton Circuit Court.—*Hon. C. A. Calvird,* Judge.

REVERSED AND REMANDED.

C. C. Barrett; T. C. Owen and *W. S. Jackson* for appellants.

Henry P. Lay for respondent.

ELLISON, J.—Plaintiff's action is in equity whereby she seeks a decree requiring defendants to deliver to her certain notes alleged to be hers and to

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account to her for amounts of interest and principal collected, the notes and collections aggregating near three thousand dollars. The decree was for the plaintiff.

The defendants are husband and wife. It appears that defendant Anna at the time of her marriage with the other defendant was a widow with one child, who is the plaintiff herein, and who, since the matters of which she complains transpired and before this action, married one Mitchener. The action was first brought by plaintiff against her stepfather alone. Her mother was afterwards made a party defendant.

Plaintiff's claim is that she became the owner of the notes by a gift from her stepfather; and that the gift was consummated by the stepfather loaning the money and taking notes and deeds of trust securing them, in the name of plaintiff, and delivering them to her, and that she placed them in her trunk. But afterwards, the stepfather got them from her and put them in a bank. It was then shown that the stepfather had made many statements or declarations tending to corroborate plaintiff's testimony as to the gift. Her account of how the gift came to be made is rather vague. Her attorney asked her: "If Mr. Frazer ever said anything to you about giving you these notes, just tell the court what he said? A. What do you mean, Mr. Lay? O. Well, to refresh your memory, did he ever tell you anything about giving you a certain amount of property? A. Well, he said he would give me five thousand dollars, and that he would put it in mortgages on land; he talked about willing it to me first, but he said if he willed it to me, why his other children would come in and break the will, and he said a mortgage on land couldn't be broke."

She afterwards stated that this was just before he made the loans in her name.

Defendants deny the gift, but admit the notes and

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deeds of trust were taken by the stepfather in plaintiff's name. They account for that by saying that it was at plaintiff's request and merely to gratify a notion of hers that if the money was loaned in her name it would make her more popular in the neighborhood and that she would become a young person of more consequence. Among other evidence in corroboration of there not being a gift, was that plaintiff was once summoned before the county board of equalization and required to state why the notes were not assessed, and that she disclaimed ownership of them and that in consequence the notes were assessed to the defendant stepfather. It was also shown that she had never attempted any acts of ownership; had not collected interest or principal, or made inquiry or claim concerning them.

Taking the present record as the foundation, it must be said that the title and ownership of the money, prior to the alleged gift to plaintiff, was in the defendant mother, and that the defendant stepfather was merely her agent in loaning and caring for it. Now, while he was his wife's agent to loan and collect the money, he was not her agent with authority to give it away. The latter power by no means follows as a consequence of the former. [Case v. Hammond Packing Co., 105 Mo. App. 168; Haynes v. Carpenter, 86 Mo. App. 30; Henson v. Keet Merc. Co., 48 Mo. App. 214, 220.]

But it is said that the wife (plaintiff's mother) was a party to the gift and approved of it. The evidence of this is not much more than conjecture. She testified she assented to plaintiff's request that the money be loaned in her name, but she disclaimed any gift to plaintiff.

While we would not care, in a case of gift *inter vivos*, to rely upon cases cited us by defendants as to the degree of proof required in gifts *causa mortis*, yet we agree with defendants that it should be defi-

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nite, as distinguished from mere supposition or dubious inference.

On retrial it would be better to pursue a definite theory as to the gift claimed. It should be made to appear, with as much certainty as may be under the circumstances, when it was made, and where, with the circumstances attending, etc. One prominent fact stands out definitely in plaintiff's favor, and that is the notes being in her name; but nearly all else is too vague to be satisfactory. In this connection we do not put so much reliance on the presumption of ownership in plaintiff from the mere fact that the notes were in her name. There is no necessity for presumptions here, since the evidence shows the case must be determined on the question whether there was a gift. In establishing that, the name in which the notes appear is strong evidence disconnected from mere presumption.

We will call attention to the admission of improper evidence in plaintiff's behalf in declarations of the stepfather, out of the presence of the mother, as to his intention to give money to plaintiff or to provide for her. Such declarations could not affect the mother and should not affect the question whether her property had been disposed of by gift.

While we think the present record shows the money belonged to the mother before the gift, and as we have said there was not sufficient evidence of a gift from her, it would appear that plaintiff's case fails. Yet we deem it best not to reverse the judgment outright, and we will therefore remand the cause that there may be a retrial that the parties may gather what other evidence there may be, if any. Based on the present record, a judgment for either party would not be accompanied by that degree of satisfaction to the court we would wish. Reversed and remanded. All concur.

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CARRIE L. WHITWORTH, Appellant, v. ANNIE E. BARNES et al., Respondents.

Kansas City Court of Appeals, February 3, 1913.

1. **DOWER: Timber Land: Waste: Restraint.** A widow with a dower interest in lands the value of which consists principally in growing timber, may maintain a bill to restrain one in possession from wilfully committing waste by destroying the timber.

2. **WIDOW: Ejectment: Appeal: Injunction.** A person claiming to own land, brought an action of ejectment against persons claiming title in fee simple. Judgment was rendered in favor of the latter and the former appealed to the Supreme Court, and during the pendency of the appeal in that court he died leaving a widow with a right of dower if he was successful in his appeal. The land was chiefly valuable for its growing timber, and the parties in possession began to commit wilful waste by cutting and selling all of it. It was *held* that the widow could maintain a bill to restrain the waste until the case was finally decided.

3. ———: ———: ———: ———: **Injunction.** Where timber growing on land is its chief value, an injunction may be had to restrain its destruction during the pendency of an appeal in another action involving the title, wherein the party in possession obtained a judgment.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,* Judge.

REVERSED AND REMANDED.

Sebastian & Sebastian for appellant.

Harris & Finley for respondents.

ELLISON, J.—This action is in equity to restrain waste of timber growing upon lands in which plaintiff is alleged to have an interest. A demurrer to the petition was filed, on the ground that no cause of action or for relief was stated. The demurrer was sustained and plaintiff appealed.

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The petition alleges that plaintiff is the widow of William Whitworth, who died intestate in April, 1912, leaving plaintiff and three children. That in his lifetime and at his death he was seized in fee of certain described land, in which plaintiff had a dower life estate. That several years prior to his death this defendant, who is one of the children, and her husband, took possession of the land under a lease from Whitworth and that after the lease expired they refused to surrender possession and Whitworth brought an action of ejectment for the land. To this action defendants set up a claim of title by gift from Whitworth, and this claim was sustained by a judgment for them in the circuit court. That Whitworth thereupon appealed the case to the Supreme Court, where it is yet pending undecided, and then died. That defendants remained in possession and are wilfully and wantonly cutting the timber therefrom, which is its principal value, and selling it, and declare they will cut it all and dispose of it, thereby stripping the land and rendering it practically valueless and practically destroying the value of plaintiff's dower interest before a decision can be had by the Supreme Court; that defendants are insolvent.

We have no briefs from defendants. Accepting the allegations of the petition as true, the defendants, who are insolvent, are committing such wanton waste as to practically destroy the value of plaintiff's dower estate. Being the owner of a life estate, she has the right to have defendants restrained.

That right is not annulled by the judgment of the circuit court in the ejectment suit, that defendants are the owners of the land. It is true that if defendants are the fee simple owners, plaintiff has no dower. But an appeal was taken from that judgment to the Supreme Court, which is yet undecided, and plaintiff has a right to protect her claim until a final decision that she has none. In Wood v. Braxton, 54 Fed. 1005,

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the court said: "Where the timber on land constitutes the chief element of value, an injunction will issue to restrain a cutting, pending an appeal to the Supreme Court of the United States, in another action involving the title, wherein the present defendant obtained judgment against the present plaintiff in the trial court."

The commission of waste by one in possession of land claiming adversely to plaintiff, may be restrained pending an appeal from a decree adjudging defendant's title to be valid. Plaintiff has a right to have the status of the property preserved during the pendency of an appeal taken in good faith. It would be gross injustice to have one's property returned to him wasted and valueless at the end of his successful effort to wrest it from a wrongful claimant. [Woods v. Riley, 72 Miss. 73; Erhardt v. Boaro, 113 U. S. 537; Peoples Traction Co. v. Railroad Co., 67 N. J. Eq. 370; Walker v. Maddox-Rucker Banking Co., 97 Ga. 386.] In principle this view is sustained by the Supreme Court in State ex rel. v. Guthrie, 245 Mo. 144, 149 S. W. 305.

The demurrer should have been overruled, and therefore the judgment will be reversed and the cause remanded. All concur.

W. G. RAMSEY, Appellant, v. FRANK ROTHWELL, Respondent.

Kansas City Court of Appeals, February 3, 1913.

1. **OFFER OF JUDGMENT: Costs: Justice of the Peace.** If in an action before a justice of the peace, an offer of judgment is made by defendant before trial and it is not accepted by the plaintiff, and he does not afterwards recover more than the sum offered, the costs accruing after the offer will be assessed against the plaintiff.

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2: ———: ———: ———: **Repeated Offer: Circuit Court.** In an action appealed from a justice of the peace to the circuit court, an offer of judgment made by defendant, before the justice need not be repeated in the circuit court.

3. ———: ———: ———: **Election of Counts.** If a plaintiff, on defendant's motion, is compelled to elect to prosecute his action on two counts and abandons the third (all arising out of the same transaction), it does not deprive defendant of the benefit of an offer of judgment made before the trial.

4. ———: ———: ———: **Tender.** The statute permits a defendant to save himself from the costs of an action by an offer of judgment without a tender of anything.

5. ———: ———: ———: **Judgment: Clerk: Taxing Costs.** If there has been an offer of judgment by a defendant to a plaintiff which the latter did not accept and he afterwards does not recover more, it is error under the statute to render judgment in favor of the plaintiff for all of the costs, which cannot be remedied by the clerk taxing the costs contrary to the judgment. Such error is properly reached by a motion for new trial or in arrest, filed within four days.

6. ———: ———: **Motion to Retax: Suggestion to Court: Continuance: Power to Correct Judgment: Discretion.** If an offer of judgment is made by a defendant and not accepted by a plaintiff, and thereafter he does not recover more than the sum offered, and a judgment is rendered against defendant for the costs arising after the offer and no motion for new trial or in arrest is filed by defendant, yet if during the term, though more than four days after the judgment, he files a motion to retax the costs, it may be considered by the court, if it so desires, as a suggestion for an exercise of its power to correct the judgment on its own motion. And if the motion to retax is continued to a subsequent term, it will carry the case with it and the judgment may be corrected at such term.

Appeal from Johnson Circuit Court.—*Hon. A. A. Whitsett,* Judge.

AFFIRMED.

J. W. Suddath & Son for appellant.

Jas. W. Kemper for respondent.

ELLISON, J.—This action was begun before a justice of the peace by filing a statement containing

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three causes of action arising out of the same transaction. By the first it was sought to recover five dollars as the hire of a surrey and team. The second and third were in the nature of conversion of the surrey and team and each asked damages in the sum of two hundred and twenty-five dollars.

On the day of the trial before the justice, but before the jury was sworn, defendant made a written offer to permit a judgment to be entered against him for five dollars and served notice thereof on plaintiff. The latter did not accept the offer. A motion was made by defendant to require plaintiff to elect which of the three causes of complaint he would pursue. The justice overruled the motion. A trial was then had, resulting in a judgment for defendant. Plaintiff appealed to the circuit court, where the motion to require plaintiff to elect was renewed and was sustained, and he thereupon made his election to try the second and third counts. The cause was continued and at the next term a trial resulted in a judgment in his favor for one dollar, with a clause adjudging all the costs in both the justice's and circuit courts against defendant. A motion for new trial was filed by plaintiff during the term, but more than four days after judgment; and a motion to retax the costs so as to put all costs arising after the offer of judgment before the justice, against plaintiff, was filed by defendant more than two weeks after judgment. The motion for new trial was overruled and the motion to retax the costs was sustained. Plaintiff then appealed to this court.

The motion for new trial not being filed within four days, as required by the statute, left plaintiff without right to complain of its being overruled.

The question as to costs is really the only contention between the parties. The statute (R. S. 1909) involved reads as follows:

"Sec. 7454. The defendant may, at any time be-

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fore the jury is sworn or the trial is commenced, serve upon the plaintiff, or file with the justice, an offer in writing to allow judgment to be taken against him for the sum or to the effect therein specified. If the plaintiff accept the offer before the jury is sworn or the trial is commenced, by giving the defendant written notice thereof, or by filing such notice with the justice, judgment shall be entered accordingly, and plaintiff shall recover costs up to the time of receiving notice of such offer.

"Sec. 7455. If the plaintiff does not accept such offer and give notice thereof, the same shall be considered as withdrawn, and shall not be given in evidence or referred to on the trial or in the argument, and if the plaintiff fails to obtain a more favorable judgment, he shall pay the costs from the time of receiving notice of such offer, and if he fails to recover any judgment, he shall pay all the costs."

This statute permits a defendant to save himself in the costs without a tender of any such which he may admit to be due the plaintiff, if he will make an offer of judgment. [Lieurance v. McComas, 59 Mo. App. 118.] When the offer is made, as there provided, and is not accepted by the opposite party as there required, and he shall not recover more than the offer, all costs accruing after notice of the offer should be adjudged against him.

The offer once made before a justice of the peace need not be renewed in the circuit court on appeal. For if it is not accepted before the jury is sworn, it is considered to have served its purpose and is declared by the statute to be withdrawn.

Nor do we consider the fact that plaintiff afterwards elected to prosecute the action on the second and third statements of his case, abandoning the first, had the effect of nullifying his offer of judgment. Each of plaintiff's statements of his cause of action arose out of the same transaction. We cannot see any good

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reason to support plaintiff's suggestion that it affected the offer.

So we conclude that defendant having offered to permit judgment to go against him by the justice for five dollars and plaintiff having failed to accept the offer, the costs thereafter accruing, both in the justice's court and the circuit court, should have been adjudged by the court against plaintiff, and the costs accruing before the offer should have been adjudged by the court against the defendant, and the clerk would then have taxed them accordingly. Error was therefore committed in entering judgment against defendant for the costs generally.

But the question remains whether any complaint can be made by defendant. As we have stated, the record shows an unaccepted offer of judgment and a judgment thereafter obtained for less than the sum offered, and yet all the costs were adjudged against the defendant. The record thus discloses a defect or error which cannot be remedied by a taxation of costs by the clerk. A motion for new trial or in arrest of judgment is the proper procedure. Neither of such motions was filed by defendant within four days, or any other time, and we think the error waived (Bosley v. Parlo, 35 Mo. App. 232; Paul v. Machine Co., 87 Mo. App. 647; Glennon v. Gates, 136 Mo. App. 421) unless the point be saved by the following considerations, which bring us to defendant's final insistence in favor of the judgment readjusting the costs and from which the present appeal was taken. The trial court had the power at any time during the term to correct the judgment on its own motion. The paper, called a motion to retax the costs, though neither a motion in arrest nor for new trial, was filed during the term and had the effect of a suggestion to the court upon which it had authority to act and to set aside or correct the judgment if it saw proper to do so. [Ewart v. Peniston, 233 Mo. 695; Wiliams v. Rail-

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road, 156 Mo. App. 675.] It seems the motion attracted the court's attention and it continued it over to a succeeding term, which carried the cause with it. [Childs v. Railroad Co., 117 Mo. 414; Harkness v. Jarvis, 182 Mo. 231; s. c., 110 Mo. App. 277. At the succeeding term an inquiry was entered upon by the court, both parties contesting, and the proper conclusion was reached that the judgment as rendered, and the costs as taxed under it, were wrong, and it was set aside and a proper adjustment of the costs was made, with a judgment that they be paid accordingly. We are constrained therefore to affirm the judgment. All concur.

G. W. TRIMBLE et al., Appellants, v. JOHN A. STEWART et al., Respondents.

Kansas City Court of Appeals, February 17, 1913.

1. **TAXBILLS: Street Improvements: Conformity to Specifications.** In the work of putting down street improvements, a substantial compliance with the specifications is sufficient. Whether there has been a substantial compliance depends somewhat on the circumstances of each case.

2. **———: ———: Cancellation.** A variation from the specifications which does not materially change the character, location or cost of the improvements, or work a fraud on the public, or give an advantage to the contractor, or injure the appearance, or value of the property, is not sufficient to justify the cancellation of the taxbills by a court of equity.

3. **———: ———: Apportionment of cost.** Where a street in a city of the third class is graded and paved as one improvement, the whole cost is apportioned to the abutting property according to the front foot without regard to the fact that the paving is forty feet wide in the business blocks and only thirty feet wide in the residence blocks. The law does not require uniformity in width.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,* Judge.

AFFIRMED.

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N. T. Gentry for appellants.

E. W. Hinton for respondents.

TRIMBLE, J.—Appellants, as owners of a residence lot fronting west on Ninth street in Columbia, sue in equity to cancel a special taxbill for paving said street. The cancellation of the taxbill is prayed for upon three grounds: 1st, that the street in front of appellants' property was graded below the established grade; 2d, that the paving was not placed exactly in the middle of the street; and 3d, that the cost of the work was not properly apportioned. The regularity of the proceedings and the performance of the work is conceded in every other respect.

Both the resolution and ordinance provided that the street should be brought to the established grade and should be paved forty feet wide for several specified blocks in the business part of the city and thirty feet wide in the others.

The contract was awarded defendant Stewart, who did the work under the direction of the city engineer and his deputy. The grade stakes and the curb lines were set by the engineer, and the contractor conformed strictly to them without knowledge of any variation from the established grade. The engineer laid out practically all of the street strictly according to the established grade, except that in the block in which plaintiffs' property is situated, he found the sidewalks, which were already in place, slightly below grade; and he set the paving grade stakes to correspond, thus making the pavement slightly lower than the paper grade. The evidence varied as to the extent of this difference. A witness for plaintiffs said the pavement at the northeast corner of the property was a foot lower than the established grade, and that at the southeast corner it was six inches lower. The city engineer, testifying for defendants, said the difference

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was only about three inches. Whether the trial court found this difference to be three, six or twelve inches does not appear, and we are in no better position to determine that fact than he. But the precise difference is not important if, under all the circumstances and conditions of the particular spot or locality, the variation does not create a substantial change in the improvement nor injure the appearance or use and, therefore, value of the property. In certain places a difference of three inches might be very substantial, rendering the properly unsightly and diminishing its value, while in others a difference of one foot would make no difference. Just as a half inch added to a man's nose would disfigure him greatly, while ten times that much added to the length of his overcoat would never be noticed. So that the question whether this difference in grade, be it three or twelve inches, is sufficient to justify the cancellation of the taxbill by a court of equity depends upon whether the law requires, in the doing of the work, a literal and exact conformity to the terms on which it is authorized or only a substantial compliance therewith. And whether there has been a substantial conformity to the grade will depend somewhat upon the situation and conditions at the particular spot complained of. The rule of law in this State is that a substantial conformity is all that is required, and not a literal compliance. [Platte City v. Paxton, 141 Mo. App. 175; Porter v. Paving Co., 214 Mo. l. c. 20; St. Louis v. Ruecking, 232 Mo. 325.]

Was there a substantial compliance in this case? The grading was done by the contractor in strict accordance with the grade stakes set by the city engineer. The contractor did not know these stakes varied from the established grade. He did not therefore slight or avoid the work but did more grading than the specifications called for. The deeper grade did not detract in the slightest degree from the sightliness of the

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street or its usefulness for travel. The city engineer set the grade stakes in front of plaintiffs' property a trifle lower than the established grade in order that the pavement would conform to plaintiffs' sidewalk which was already constructed. If the pavement had been put on the established paper grade, the roadway of the street would have been higher than the sidewalk; and the latter would have had no drainage, and would therefore have to be raised. Plaintiffs seem to admit that no injury has been caused to the property by this change in grade so long as it remains residence property; but they claim that in case the property should ever be used for business purposes, a slight grading of the sidewalk would be necessary. They are then in this position: Owing to the location of their sidewalk, if the pavement is put strictly on the established paper grade, they will have to elevate their sidewalk *now*; but as the pavement has been made to conform to their sidewalk, they *may* have to lower their sidewalk in the *future*. Reduced to these terms it is not apparent to us that plaintiffs' alleged grievance on this account is such as to commend itself to the observant eyes of a chancellor anxious to do equity. Plaintiffs' property has a frontage of a little over 142 feet. The difference in grade at one corner from that at the other is not discernible to the eye. Under all the circumstances, therefore, there was a substantial compliance with the terms relating to grade.

The question presented by the pavement slightly deviating from the center of the street is a little more difficult of solution, and yet it is governed by the same principles as the variation from the grade. A short distance south of plaintiff's property, Ninth street has an offset or jog where it crosses Elm street. Some six or seven years before, Ninth street had been graded and paved with gravel. To avoid an offset in the graveled track it was laid so that the north and

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south center line of the gravel varied a little from the true center of the street going a little east of the center as it went south. When the paving was put down it simply conformed to this existing condition. The offset, a thing to be avoided as interfering with the use and symmetry of the street, was thus avoided or obliterated. The result, however, was to make the parking (the grassy strip between the sidewalk and curb) on plaintiffs' side a little narrower than the one across the street. The edge of plaintiffs' sidewalk next to the property line was two feet outside of said property line and this made the parking narrower than it otherwise would have been. One witness says this is what makes it visibly narrower than the parking on the other side. As conditions now are, the parking is at least three feet and eight inches wide on plaintiffs' side. Most of the testimony offered by plaintiffs as to the impairment of the property relates to that alleged to have been caused by the change in grade. Some, however, seems to be based on both causes. There was testimony on defendants side, however, going to show that the slight deviation from the center avoided the ugly offset in the street and did not impair the beauty or value of the property. This variation was not made to relieve the contractor of any burden or duty, nor was it made after he began work or with his knowledge or consent. The curb lines were marked out in the street by the city engineer and the contractor followed them implicitly, thinking they were the lines called for in the specifications. Hence this case is not like those where a change in the requirements worked a fraud on the public, or in other ways relieved the contractor of doing something he should have done, or substantially changed the location of the improvement or the specifications thereof. In all such cases the presence of any one or more of these results made the change a substantial and material change and not a mere slight deviation. But

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in this case the work done was in substantial, though perhaps not literal, compliance with the requirements. This is sufficient, under the rulings in our State, to prevent cancellation of the taxbills.

The objection that the cost was not properly apportioned is based upon the fact that in certain specified business blocks the pavement was forty feet in width while in the residence blocks it was only thirty feet wide, and the whole cost was apportioned to the abutting property according to the frontage without regard to the width of the paving. But the whole cost is required to be so apportioned. [Sec. 9254, R. S. Mo. 1909.] The law does not require the paving to be uniform in width. Nor would it be wise to require uniformity, since in business portions of a city it would be necessary to pave from sidewalk to sidewalk, while in a block or so away a less width would not only be all that is necessary but more beautiful and attractive, besides rendering the whole less expensive. The Legislature might have said that the lots having the wider pavement should bear the greater expense, or that the portions having the same width should be put in sections to themselves and the cost of each section assessed to the lots fronting on each. But as it did not, but said that when a street is paved the whole cost shall be assesed against the abutting property in proportion to the front foot; this is the only method permissible.

Finding nothing in the record to justify the intervention of a court of equity, the decree of the chancellor dismissing the bill is affirmed. All concur.

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A. W. CIES, Respondent, v. AARON W. GALE, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **REAL ESTATE BROKERS: Commission.** Where the owner tells the agent he can price the land at $130 per acre but that if it is sold, he, the owner, must have $125 an acre net to him, and never varies fom those terms, and the land is sold for $125 per acre to a purchaser who would not have paid more, and the sale at $125 is made by the owner in good faith and not to deprive the agent of his commission, the agent cannot recover even though the purchaser be of his procuring.

2. **———: ———: Rule as to Brokers' Contracts.** When a contract is made on a condition, a person seeking to recover on such contract must bring himself within such condition. And this applies to brokers' contracts.

3. **INSTRUCTIONS: Form of Verdict.** An instruction containing simply a form of verdict and nothing more, with no prefatory explanation showing in what event it is to be used, is likely to be misleading and work prejudice to the other side.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

REVERSED.

Frank Sheetz and *Lewis A. Chapman* for appellant.

J. E. Watkins and *J. M. Davis & Son* for respondent.

TRIMBLE, J.—This suit raises again the oft recurring question of a broker's right to commission for the sale of real estate. The petition asks, on the sale made, for two per cent thereof as the usual and customary rate charged by brokers.

The facts are as follows: Plaintiff, Cies, an auctioneer by trade or profession, but who on the side sold real estate for commission when he had oppor-

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tunity, was approached by defendant Gale on the subject of selling the latter's farm. Plaintiff testified: "Mr. Gale came and asked me if I would sell his farm, and I told him I would, and asked him his price, and in regard to it, and took his land *a great deal* under the circumstances I would any other land. He priced the land at one hundred and thirty dollars per acre and said he wanted one hundred and twenty-five dollars *net*. On cross-examination he said: "Q. You say that you never named any commission to Mr. Gale? A. No, sir. I told him the regular commission, and he had been receiving commissions, and I guess he understood something about it. Q. He wanted one hundred and twenty-five dollars *net?* A. That was the price he made me. Q. And told you that all the time? A. Yes. Q. And never varied from that? A. I never saw him afterwards. Q. There was never any understanding squarely, except that he was to have one hundred twenty-five dollars *net to him?* A. Yes, sir."

The defendant swore that nothing was said about a two per cent commission; that he told plaintiff he had listed it with the other agents at $130 per acre; that plaintiff could cut this price anywhere he wanted to on his commission but that he must have $125 net.

The only thing plaintiff claims to have done in selling the farm, was to tell one Roy Moore, when the latter inquired over the telephone about the Elliott farm, that he had the Gale farm at the price of $130 per acre. Plaintiff's contention is that J. R. Townsend, the purchaser of the farm, obtained his knowledge of the Gale farm being for sale from the information thus imparted by plaintiff to Roy Moore. It seems that shortly after this telephone conversation, Townsend, who afterwards purchased the land, went out to see the Gale farm in company with Allen Moore, a brother of Roy's. Townsend is also a brother-in-law of Roy Moore. Both Townsend and Roy Moore

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swear that nothing was ever said by Roy Moore to Townsend about the Gale farm until after Townsend had himself begun negotiations with Gale for the purchase of the farm, and that Roy never did tell Townsend of the information he had obtained from Cies over the phone. Roy does say, however, that he told his brother Allen about this conversation but it does not appear in evidence when he did so. Allen Moore did not testify, being in the hospital. Roy Moore also testified that he was not acting for Townsend when he called Cies over the phone and learned of the Gale farm.

All the negotiations between Townsend and Gale were conducted by themselves and resulted in a sale by Gale to Townsend of the former's farm at $125 per acre. Cies never knew of Townsend wanting the land until after the sale had been made to him. He never, prior to that time, said anything to Gale about Townsend nor to Townsend about Gale. As stated before, all he did was to tell Roy Moore of the Gale farm. The suit was for $312.50, being two per cent on $15,625, the price of the farm at $125 per acre. The trial resulted in a judgment for plaintiff for $125.

Defendant, in addition to several other assigned errors not mentioned now, makes two points in behalf of his appeal. *First,* that as plaintiff's contract was that defendant was to have $125 *net to him,* plaintiff cannot recover unless he shows that a sale was made for more than that sum or that the purchaser was willing and able to pay more. In other words, by the terms of the contract, plaintiff's commission must necessarily come out of the excess above $125 per acre, and if there is no excess, there can be no commission. *Second,* that the sale was not the result of plaintiff's efforts nor procurement.

A careful examination of plaintiff's evidence, as hereinbefore shown, discloses that the terms of the sale were to be $125 per acre *net to the owner.* It is

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true plaintiff elsewhere makes statements which indicate he thought he was to get a commission on a sale whatever the price. But his explicit and definite statement as to what the contract was cannot be overridden by his construction of that contract. It is true also that after the sale defendant said to Dick Jones, "I expect I will have to pay Cies a commission for that farm." But this could not be construed as an admission of what the contract was. It had nothing to do with the terms of the contract. It was said after Cies had threatened to sue him. Whether defendant was liable or not was a legal question depending upon the nature of the contract. The mere expression of an apprehension that he might have to pay when sued, cannot be construed into an admission of a fact in regard to the contract, especially when plaintiff's own testimony shows that, if it be an implied admission, it was incorrect. So that under this contract, plaintiff's right to a commission was conditional, or contingent. He was to sell for $125 per acre or more, and unless he procured a purchaser who was willing to pay more he would not get any commission. The owner was to receive $125 net. All over that was to be the agent's. He therefore stood to earn a large commission or none. When a contract is made upon a certain condition, a person seeking to recover under such contract must bring himself within such condition. And this applies to broker contracts. [Hughes v. Dodd, 164 Mo. App. 454; LaForce v. University, 106 Mo. App. 517; Crowley v. Summerville, 70 Mo. App. l. c. 380; Blackwell v. Adams, 28 Mo. App. 63.]

It makes no difference in this case that plaintiff was not explcitly told that if the sale did not amount to more than $125 per acre he would get no commission. He understood its terms and he must know for himself its legal effect. There was no evidence that Townsend would have paid more for the land. In fact, when defendant offered to prove by Townsend that he

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would *not* have paid more, plaintiff objected and the evidence was excluded. In addition to this, Gale would not make his net price of $125 per acre to Townsend until he was assured that no agent had sent Townsend to him. In other words, the sale by Gale at $125 per acre was made in good faith and not for the purpose of defeating a commission. So that, in view of all that has been said in this point, we are of the opinion that plaintiff has no case.

This being so, it is hardly necessary to notice defendant's second point that the sale was not the result of plaintiff's efforts. Plaintiff informed Roy Moore that he had the farm, but nowhere shows affirmatively that this information was conveyed to the purchaser Townsend. Both Moore and Townsend, however, say that no such information was conveyed to or received by Townsend. The evidence does show that Moore did tell his brother, Allen Moore, of the telephone conversation but it does not appear when he did so. Nor does it show that either Roy or Allen Moore were acting for Townsend at the time. It may be the circumstances including the relationship of the parties were such as to authorize a jury to infer or believe that the information given by plaintiff over the phone to Roy Moore was afterwards conveyed to Townsend but, even so, the question would still remain whether, under the circumstances of this case, this made plaintiff the procuring cause of the sale. The St. Louis Court of Appeals in Warren v. Crain, 71 Mo. App. 638, in a similar case, expressed doubt on this proposition but did not decide it, nor do we.

Instruction No. 2 for plaintiff was given in this form:

"A. W. Cies, Plaintiff,

v.

Aaron W. Gale, Defendant.

We, the jury, find for the plaintiff in the sum of ———— Dollars."

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This instruction did not contain a prefatory explanation showing that it was to be used only in case the jury found for plaintiff. We think a form of verdict should always contain an explanation showing in what event it is to be used. A form given without containing such explanation might perhaps be misleading and work prejudice to the other side. [Seidel v. Railroad, 109 Mo. App. 164.] The case, however, is reversed upon the first point considered. All concur.

IRA C. VAN NOY, Respondent, v. CENTRAL UNION FIRE INSURANCE COMPANY (a corporation), Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **CORPORATIONS: Principal and Agent: Contracts.** A corporation is not responsible for contracts entered into, before it came into existence, by promoters assuming to bind the company in advance; no principal of the law of agency being applicable to a case of this kind, as agency implies the existence of a principal.

2. **———: Contracts: Promoters.** When a corporation becomes a legal entity, the corporation has the option of adopting or repudiating contracts for its benefit made by its promoters, and the exercise of such option may be manifested, as well, by acceptance and retention of the benefits of such contracts, as by an express agreement.

3. **———: ———: ———.** Under Sec. 7001, R. S. 1909, a corporation becomes a corporate entity for the purpose of entering into contracts when it receives its certificate of incorporation; and in accepting the benefits of the contracts of its promoters, it adopted those contracts as its own, and takes them with all their burdens and infirmities.

4. **———: ———: Readjustment Contract: Scope of Authority.** When an officer of a corporation is given authority to enter into a new contract in the nature of a readjustment and compromise of the old, the acts of that officer performed within the apparent scope of such authority binds the corporation, though they exceeded the limits of the authority intended to be conferred.

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Appeal from Jackson Circuit Court.—*Hon. Jas. H. Slover*, Judge.

AFFIRMED.

Leslie J. Lyons for appellant.

Franklin D. Glore for respondent.

JOHNSON, J.—Plaintiff alleges he bought and paid for 150 shares of the capital stock of defendant corporation and that defendant delivered to him a certificate for 100 shares but refused to issue a certificate for the remaining fifty shares and converted them to its own use. The prayer of the petition is for the recovery of the value of the shares so converted. The answer is a general denial.

A trial of the cause resulted in a verdict and judgment for plaintiff in accordance with the prayer of the petition. Defendant appealed and argues, first, that the jury should have been peremptorily instructed to return a verdict in its favor.

The defendant is a fire insurance company, organized and incorporated in this State under the provisions of article 6, chapter 61, Revised Statutes, 1909. On April 2, 1910, the organization of the company reached the point where the incorporators became entitled to a preliminary certificate of incorporation and such certificate was issued to them on that date by the Secretary of State under the provisions of section 7001, Revised Statutes, 1909, which declare that on the receipt of such preliminary certificate the corporators "shall be a body politic and corporate, and may proceed to organize in the manner set forth in their charter and to open books for subscription to the capital stock of the company and keep the same open until the whole amount specified in the charter is subscribed, but it shall not be lawful for such companies

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to issue policies or transact any business of any kind whatever, except as aforesaid, until they have fully complied with the requirements of sections 7002 and 7003."

These requirements were not fulfilled until October 17, 1911, on which date a final certificate was issued authorizing the corporators to transact business with the public as a fire insurance company. Prior to that time the activities of the incorporators had been confined to the organization of the company and their chief task had been to sell the treasury stock. The plans of the promoters contemplated that the capital stock should be 100,000 shares of the par value of ten dollars per share and that sales agents should be employed to sell the stock. To pay the commissions of these agents and to defray the expenses of the preliminary organization it was proposed to sell the stock at a premium in order that the corporation might begin business with an unimpaired capital. 20,000 shares were set apart for sale "to the directors and founders of the company" at $12.50 per share leaving a margin of $2.50 per share for the expenses and commission fund. It was proposed to distribute this stock among fifty different men of high reputation in the business world to be known as the "founders" of the company, and after such distribution had been effected, to place the remaining 80,000 shares on the market for sale to the general public at twenty dollars per share. Accordingly a general sales agent was employed by the promoters to sell the stock on commission and in his contract of employment it was agreed that he would "set aside out of his commission twenty-five cents a share on each of the 80,000 shares of stock sold at twenty dollars a share and deposit same with the treasurer as a fund to be divided equally between the fifty founders when the sale of the capital stock of the company is completed. The division of the said

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fund to be considered as compensation to the fifty founders for the labor and expense of answering letters of inquiry and furnishing such letters of introduction as may be required."

This contract, therefore, provided for the creation of a fund which would amount to $20,000 when all of the 80,000 shares were sold by the agents and it was intended by the promoters and promised by the agents to persons solicited to become founders that this fund should be divided equally among the fifty founders so that each would receive $400 as a rebate on the purchase price of his stock. Consequently, a founder who subscribed for 400 shares paid $5000 for his stock and received it with the agreement of defendant to refund him $400 when all of the stock offered to the public had been sold. In other words the inducement held out to a founder was that he would be permitted to obtain a block of stock for $4600, which would cost a general subscriber $8000.

Further it appears that, doubtless, for the purpose of aiding the agents in procuring desirable founders the 20,000 shares were divided into blocks of fifty shares each and the agents were authorized in some instances to give a rebate agreement with the sale of one of such blocks but were not authorized to offer any one founder more than a single rebate.

Plaintiff was solicited by agents thus employed to become a founder and on March 15, 1910, he subscribed for a block of fifty shares at $12.50 per share, or $625 for the block. He paid $125 (the amount of the premium) in cash and gave three notes in payment of the remainder of the price, due in two, four and six months. The sale was made on the condition that he was to have a founder's rebate which, if he had made no further purchase of stock, would have reduced the cost of his stock to $225. On March 19, at the solicitation of the agents, he purchased another block at the same price and he says on the same terms

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and in the afternoon of the same day he bought 300 shares more. In payment of the last purchase he gave four promissory notes maturing at different dates during the summer, one for $750, which represented the premium on the 300 shares and three for $1000 each, representing the par value. Plaintiff states that he bought this stock on the representation and agreement that he would be entitled to a single rebate for each block or, six rebates in all, which on payment of the rebates would reduce the cost of the 300 shares from $12.50 each to five dollars. Three weeks later and after the corporators had received the preliminary certificate of incorporation, plaintiff was informed by another sales agent that the promise that he should have a rebate for each block, which was orally made, was unauthorized and that the agents had misrepresented the terms of the sale. He immediately interviewel the attorney of the corporators and was informed that he would be entitled only to one rebate for all his purchases. He then went to the office of the corporators and declared to the secretary who was in charge his purpose to rescind the sale of the 300 shares on the ground of the false and fraudulent representations of the agents. The secretary assured him, so he states, that they would not allow their agents to perpetrate such frauds, that the matter would be fixed and suggested that plaintiff should come before the directors at their next meeting and lay the case before them. Plaintiff assented to this proposal and came to the next meeting. He was met by the secretary who stated, in effect, that it would not be necessary for him to go into the meeting of the board and that the matter would be adjusted by him and the general sales agent who was present. The secretary then explained that the note given by plaintiff for $750 had been discounted at a bank to procure funds for expenses and commissions and could not be returned but that they would return the three notes

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of $1000 each and when the time came to issue stock certificates, would issue a certificate to plaintiff for 150 shares to cover the first two purchases aggregating 100 shares and fifty shares in lieu of a return of the $750 note. Plaintiff agreed to this proposal and thus the sale of the 300 shares was rescinded by agreement and in lieu of that sale plaintiff purchased a third block of stock for the payment of which defendant had his note of $750. He paid this note and the other notes given in the first two transactions and became entitled to a certificate for 150 shares; but defendant afterward denied the agreement and issued a certificate for only 100 shares, refusing to acknowledge plaintiff's ownership of the remaining fifty shares.

The evidence of defendant differs in vital respects from that of plaintiff from which the foregoing statement is taken. According to the testimony of defendant's witnesses it appears that defendant's officers did not admit nor act on the statement of plaintiff that false representations had been made to him by the sales agents and that he had been promised a rebate on each block of fifty shares, nor did they agree to rescind the sale of the 300 shares. The subscription agreement was in writing contained the provision that if plaintiff should "make default for thirty days after same becomes due in any of said deferred payments, this contract shall be returned to me and the company shall retain all payments theretofore made as liquidated damages and the company may resell said stock." The secretary testified that plaintiff urged other reasons for being released from the contract than his claim of fraud and that he told plaintiff that defendant would endeavor to resell the stock and if successful would return plaintiff's three notes of $1000 each, but would not return the $750 note or its proceeds since it had been used for organization expenses. He promised, though, to give plain-

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tiff fifty shares of stock for that note, provided that the resale of the 300 shares could be made without expense to defendant. Afterward the stock was resold by defendant but with the usual expense and outlay of commissions incidental to such sales. The minutes of the difectors' meetings show that on June 10, 1910, plaintiff appeared in person before the board "in explanation of his purchases and requested a cancellation of his subscription" and that a committee was appointed "to investigate said purchase and report on same to the first executive committee meeting to be held one week from that date."

On July 29, at a meeting of the directors the following resolution was adopted: "Whereas, I. C. Van Noy heretofore subscribed for three hundred shares of the capital stock of this company, first series, as shown by subscription contract No. 1651, and whereas subsequently and in lieu thereof E. L. Harrison, subscribed for one hundred shares of the capital stock of the company, first series, as shown by subscription contract No. ——, and S. R. Hill subscribed for one hundred shares, first series, as shown by subscription contract No. 2480, and the Brown News Company subscribed for one hundred shares, first series, as shown by subscription contract No. 1846, all of which three latter subscriptions were made in lieu and in place of the stock subscribed by the said I. C. Van Noy.

"Therefore, be it resolved by the board of directors that the said I. C. Van Noy subscribed for and the same is hereby canceled, and the said subscription by E. L. Harrison, S. R. Hill and the Brown News Company are accepted in place thereof, and the treasurer of the company is directed to surender to I. C. Van Noy his three unpaid notes for $1000 each in exchange for his original receipt, and upon the further condition that the first payment made by the said I. C. Van Noy upon said original subscription for said

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three hundred shares, being in the amount of $750, is hereby forfeited by him to this company."

Plaintiff paid his note of $750 to the bank May 18, 1910. On June 23, 1910, he executed and delivered to defendant a written assignment of the 300 shares of stock conditioned for the cancellation and return of his three notes of $1000 each. The notes were returned to him some time in the following August and the certificate for 100 shares of stock was issued and delivered to him January 11, 1911. The evidence does not show that the board of directors gave the secretary of the company express authority to release plaintiff from his subscription to the 300 shares and to enter into a new contract to give plaintiff fifty shares for the note of $750. The prinicpal issue of fact in the case is whether the secretary assuming to have authority so to do, agreed to a rescission of the contract for the 300 shares and to issue to plaintiff a certificate for fifty shares in lieu of the note for $750. The evidence as a whole shows quite clearly that a serious controversy had arisen between the parties over the sale, that plaintiff was insisting he had been defrauded and that the secretary, while not admitting the charge, regarded and treated the case as one that should be adjusted and settled.

Indeed, both parties appear to have entertained the thought that a compromise should be made. According to the statement of plaintiff he was willing to pay a higher price for fifty shares of stock that he had paid for the other stock he had purchased, while the secretary admits he agreed to release plaintiff from the sale in the event defendant could resell the stock and to release him without loss if the resale could be made without additional expense. The contention of each party as to the terms of this compromise agreement is supported by substantial evidence and both are reasonable and plausible. The jury decided to accept plaintiff's version of the transaction and in the

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consideration of the demurrer to the evidence we shall assume as proved the statement of plaintiff that the secertary agreed to a rescission and to give him fifty shares of stock for his note of $750. Counsel for defendant has closely analyzed the evidence and has pointed out the weak points of that relied on by his adversary, but after all is said in favor of that analysis that may be said, it merely goes to the issue of the weight of the evidence and falls short of demonstrating that plaintiff's position is not supported by substantial evidence. We must draw every reasonable inference that may be drawn in favor of plaintiff and so doing must hold that his evidence presents the issue we have been discussing as one about which reasonable minds well might differ and, therefore, as an issue of fact for the jury to determine.

But it is argued the evidence fails to show that defendant's secretary had authority to enter into a new contract on behalf of the corporation.

The three contracts for the purchase of stock entered into between plaintiff and the sales agents of the promoters of the corporation were made before the corporation received the first certificate which, as stated, was issued by the Secretary of State April 2, 1910, and being made before a corporate entity came into being, were contracts with the promoters which the corporation was not bound to accept as made in its behalf.

The rule is well settled that a corporation is not responsible for contracts entered into before it came into existence by promoters assuming to bind the company in advance. No principle of the law of agency is applicable to a case of this kind, as agency implies the existence of a principal. [Blackwell v. Adams, 28 Mo. App. l. c. 61; Davis v. Creamery Assn., 63 Mo. App. 477.] After becoming a legal entity the corporation has the option of adopting or repudiating contracts for its benefit made by its promoters and the

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exercise of such option may be manifested as well by the acceptance and retention of the benefits of such contract as by an express formal ratification. Indeed it is pointed out by the Supreme Court in Furniture v. Crawford, 127 Mo. l. c. 364, that there can be no ratification by a corporation of a contract formed by its promoters prior to the completion of the corporate organization. "The so-called ratification by the corporation is nothing more nor less than the making of an original contract. The fact that the corporation makes the same contract theretofore made by its promoters does not constitute a ratification but is an original contract of the corporation . . . This so-called adoption need not be shown by express acts, but may be proven by acquiescence, as any other original contract might be shown." [See, also, Contracting Co. v. Construction Co., 150 Mo. App. 505.]

Defendant became a corporate entity for the purpose of entering into contracts for the sale of its capital stock on April 2, 1910, when it received its first certificate (section 7001, R. S. 1909), and in accepting the benefits of the contracts its promoters had procured from plaintiff, it adopted those contracts as its own and took them with all their burdens and infirmities. If, as plaintiff contends, the last of those contracts, each of which was a distinct and independent transactions, was procured from him by false and fraudulent representations on which he relied under circumstances justifying such reliance, defendant took the benefits of that contract to plaintiff's right of rescission on the ground of fraud. Plaintiff elected to exercise that right and appearing at the principal office of defendant, expressed his purpose to the officer of defendant in apparent charge of the office and demanded the return of his notes. That this officer communicated to the board of directors the substance of plaintiff's complaint and demand is a fact about which there can be no real dispute and that the

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board invested the officer with authority to act for the corporation in adjusting the controversy is an inference that finds abundant support in the evidence of defendant as well as in that of plaintiff. The substance of the testimony of the secretary is that he agreed that the corporation would endeavor to sell the stock and if successful would return plaintiff's notes which represented its par value and if such sale could be effected without expense, would give plaintiff fifty shares of stock for his note representing the premium. The minutes of the meetings of the board from which we have quoted tend to show that the secretary had been given authority to enter into that kind of a compromise agreement with plaintiff, and on this premise we do not hesitate in saying that given authority to enter into a new contract in the nature of a readjustment and compromise of the old, the acts of the secretary performed within the apparent scope of such authority would bind the defendant though they exceeded the limits of the authority intended to be conferred.

In other words, if defendant told its agent to compromise the case with a conditional agreement to give plaintiff fifty shares of stock for his premium note and the agent exceeded the instructions by entering into an unconditional agreement, we say he was acting within the apparent scope of his real authority which was the authority to represent the corporation in compromising a business controversy and defendant is bound by his act.

And, further, we hold that the evidence, as a whole, will support an inference that the secretary not only had apparent authority to compromise the case on the terms of the settlement plaintiff states was made, but had real authority to make the settlement and that defendant purposely delayed the execution of the compromise agreement until after the maturity of the notes plaintiff gave for the purchase price of the

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stock when the claim could be advanced with show of reason that the resale of the stock had been made under the terms of the forfeiture clause in the subscription contract and not pursuant to any compromise agreement; and in this way the proceeds of the $750 note could be retained by defendant as liquidated damages for the alleged breach by plaintiff of the subscription contract. The evidence of plaintiff and the reasonable inferences that may be drawn from it support the contention of plaintiff that defendant, through its authorized agents, entered into a compromise agreement to issue him a certificate for 150 shares of stock and that in refusing to issue a certificate for more than 100 shares, defendant, in fact and in law, converted fifty shares of stock belonging to plaintiff to its own use.

The demurrer to the evidence was properly overruled.

Objection is made to the instruction on the measure of damages but we rule that the instruction declares the only proper rule for application in a case of this character. Another objection to the instructions has been fully answered in what we have said on the demurrer to the evidence. The cause was fairly tried and the judgment is affirmed.

All concur.

STATE OF MISSOURI, Respondent, v. J. E. DEMPSEY, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **APPEAL AND ERROR: Abstract of Record: Supersedeas.** When an appeal is taken and no stay or *supersedeas* granted, nor a full transcript or printed abstract of the record filed within the time required by Sec. 2048, R. S. 1909, it is not the duty of the appellate court to obtain the record in a manner not provided by the statute.

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2. ———: ———: **Duty of Court.** When a full transcript of the record has been lodged in the appellate court in the time prescribed by the statute, it is the duty of the court to render judgment on the record regardless of the absence of an abstract, statement or brief.

Appeal from Chariton Circuit Court.—*Hon. John P. Butler,* Judge.

AFFIRMED.

J. A. Collett and *John D. Taylor* for appellant.

Roy W. Rucker for respondent.

JOHNSON, J.—A short form transcript was filed in this court February 19, 1910, from which it appears that defendant was allowed an appeal from a judgment rendered against him in the circuit court on a verdict of a jury finding defendant "guilty as charged in the information and assessing" his punishment at a fine of three hundred dollars. No stay or *supersedeas* was ordered on the granting of the appeal and the transcript does not inform us of the nature of the case, but we shall assume it was a prosecution for some misdemeanor alleged to have been committed by defendant. The appeal was returnable to the October term, 1910, but no full transcript of the record was filed fifteen days before that term.

Pursuant to a written stipulation filed by the parties the cause was continued to the March term, 1911, and then to the October term of that year. No transcript of the record, abstract, statement or brief has been filed and there is nothing before us for consideration and determination.

If a full transcript of the record had been lodged in this court in the time prescribed by statute it would be our duty to render judgment on the record regardless of the absence of an abstract, statements and briefs. [Sec. 5312, R. S. 1909; Hamuel v. State, 5

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Mo. 260; State v. Davidson, 73 Mo. 428; State v. Rhodes, 35 Mo. App. 360; State v. Ross, 119 Mo. App. 401.] But in the absence of such transcript we are constrained to ascertain upon whom the duty devolved of filing a perfect transcript. Section 5308, Revised Statutes 1909, imposes such duty on the clerk of the circuit court in criminal causes where the appeal operates as a stay of proceedings. Section 5309 puts the duty on the appellant where the appeal does not operate as a stay of proceedings and provides that on the application of the appellant, the clerk of the circuit court shall make out, certify and return the transcript "as in civil cases except that the costs of the transcript shall not be required in advance."

Section 2048 required the transcript to be filed fifteen days before the first day of the October term, 1910. Since the appeal in this action did not operate to stay the proceedings, the duty of filing the transcript was on the appellant. As was said by the Supreme Court in Caldwell v. Hawkins, 46 Mo. 263, and by the St. Louis Court of Appeals in State v. Caldwell, 21 Mo. App. 645, "the duty of filing the transcript in proper time is a personal duty devolving on the appellant and he cannot transfer it to the clerk . . . the statutory duty is plain and imperative and cannot be dispensed with."

By merely filing a short form transcript and doing nothing more appellant cannot be said to have performed his duty. Without either a full record or a printed abstract of the record we are left completely in the dark about the case and to construe the statutes as providing that an appellant may leave us in such situation would impose on us the duty of obtaining the record in a manner not provided by statute and manifestly not within the purpose of the code of procedure.

The judgment is affirmed. All concur.

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S. J. CRANE, Appellant v. THE KANSAS CITY BASEBALL AND EXHIBITION COMPANY and GEORGE TEBEAU, Respondents.

Kansas City Court of Appeals, February 17, 1913.

1. **NEGLIGENCE: Contributory Negligence: Base Ball Parks.** The plaintiff sued to recover for personal injuries received while attending a baseball game in the defendants' ball park. He purchased a ticket which entitled him to a seat in the grandstand, protected from foul balls and wild throws by a wire netting; but instead of going there, he voluntarily chose to take a seat which was unprotected. During the progress of the game he was struck by a foul ball and injured. The trial court as a matter of law, declared that he was not entitled to recover. *Held*, that the plaintiff's contributory negligence was apparent and indisputable.

2. ———: **Reasonable Care: Safety of Spectators.** The defendants were not insurers of the safety of spectators but, being engaged in the business of providing a public entertainment for profit, they are bound to exercise reasonable care, i. e., care commensurate to the circumstances of the situation to protect their patrons against injury.

3. ———: **Full Knowledge of Dangers.** Where one attending a baseball game is offered a choice of two positions, one of which is less safe than the other, he cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chose the more dangerous place.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas*, Judge.

AFFIRMED.

L. A. Laughlin for appellant.

Hadley, Cooper, Neel & Wilson for respondents.

JOHNSON, J.—This is an action for personal injuries alleged to have been caused by negligence of defendants. The answer in addition to a general denial pleads contributory negligence and assumed risk.

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The cause was submitted to the trial court on an agreed statement of facts in which it is stipulated that if the facts disclose a good cause of action, plaintiff shall have judgment for one hundred dollars and costs. The defendants separately requested the court to declare as a matter of law that plaintiff is not entitled to recover. These requests were granted and judgment was rendered for defendants. Plaintiff appealed.

The ruling of the court in giving these declarations of law to which exceptions were duly made and preserved by plaintiff, requires us to look at the facts from the viewpoint most favorable to plaintiff; and if we should find they will support a reasonable inference that his injury was caused by the negligence pleaded in the petition, unaided by negligence of plaintiff, the conclusion would follow that the court erred in holding as a matter of law that plaintiff had no cause of action.

The facts of the case are as follows: The defendants are the owners of a baseball park in Kansas City and are engaged in the business of giving public exhibitions of professional baseball. The defendant corporation is a member of a league or association of baseball clubs known as the "American Association." This association is composed of eight professional clubs and games are played according to schedule in the various cities to which the respective clubs are accredited. The home of the club owned and conducted by defendants is in Kansas City and the games assigned to Kansas City are played in defendants' park under their management and control. The association and its constituent clubs are purely business enterprises conducted for profit. When a game is played in Kansas City spectators are compelled to pay admission fees; the fee to the grand stand being fifty cents and to the "bleachers" twenty-five cents. The grand stand seats have the advantage over those in the "bleachers" of being closer to the scene of ac-

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tion and of having a roof over them. The seating structures are on the west end and north side of the park. The home plate is at the west end of the diamond and the center of the grand stand is back of the catcher. The north side of the grand stand extends eastward some distance beyond a point opposite third base and is followed by the "bleachers" which extend on to the east end of the park. The "foul lines" run respectively from the home plate to and beyond first and third bases. The object of the batter is to "make a hit," and to do so he must strike a pitched ball and send it to some point inside the "foul lines." The object of the pitcher is to prevent the batter from making a safe hit and such object is aided by a foul hit which cannot help and may count against the batter. Foul hits, therefore, are common incidents of every game, and balls thus hit go into the foul territory in every direction and, of course, may go into the grand stand and bleachers. To guard nearby spectators against injury from such balls the grand stand seats are protected by intervening wire netting of very loose mesh. This netting on the north side extended east to a point opposite third base, thence on east, the grand stand and "bleacher" seats were unprotected.

Plaintiff attended a game as a spectator and paid for admission to the grand stand. Reserved seats are not sold and he had the option of seating himself at some place behind the netting or in an unprotected seat. He chose one of the latter and during the progress of the game was struck by a foul ball and injured. His claim is that defendants were negligent in not screening in the whole of the grand stand and that such negligence was the proximate cause of his injury.

In the agreed statement of facts it is said: "Baseball is our national game, and the rules governing it and the manner in which it is played and the risks

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and dangers incident thereto are matters of common knowledge." Plaintiff's concurrence in this statement would seem to justify the conclusion that he was no novice at the game but was familiar with the risks and dangers incident to the situation of the spectator occupying a seat in the grand stand. Defendants were not insurers of the safety of spectators but, being engaged in the business of providing a public entertainment for profit, they were bound to exercise reasonable care, i. e., care commensurate to the circumstances of the situation to protect their patrons against injury. [King v. Ringling, 145 Mo. App. 285; Murrell v. Smith, 152 Mo. App. 95.] In view of the facts that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators, we think the duty of defendants towards their patrons included that of providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.

Defendants fully performed that duty when they provided screened seats in the grand stand and gave plaintiff the opportunity of occupying one of those seats. It is unnecessary to consider the question of whether defendants were bound to have a protected seat available for the use of plaintiff. We are not dealing with a case where the patron was compelled to occupy an unprotected place or not see the game, but with a case where he was offered a choice between a protected and an unprotected seat and, with full knowledge of the risks and dangers of the situation, voluntarily chose the latter. It is said by the Supreme Court of Michigan in Blakely v. White Star Line, 118 N. W. Rep. 482:

"It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted

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or thrown outside the lines of the diamond and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation and may be held to assume the risk."

So in the present case plaintiff, doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting, voluntarily chose an unprotected seat and thereby assumed the ordinary risks of such position. And if it could not be said that he assume the risk still he should not be allowed to recover since his own contributory negligence is apparent and indisputable. One invited to a place who is offered a choice of two positions one of which is less safe than the other cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chooses the more dangerous place. That is a fundamental rule of the law of negligence. The court committed no error in holding as a matter of law that plaintiff has no case.

The judgment is affirmed. All concur.

H. C. CROWELL, Appellant, v. ELLEN DONOHO, Respondent.

Kansas City Court of Appeals, February 17, 1913.

1. **PHYSICIANS AND SURGEONS: Implied Contracts: Adult Children.** The plaintiff sued to recover compensation for surgical services performed on an adult daughter of the defendant. The defendant was the administratrix of her deceased husband's estate. The plaintiff first visited the home of the defendant to consult with local doctors about the daughter's condition; later he performed three operations on her. For the first visit and operation he received his compensation from defendant and he now sues to recover for the last two operations on the theory of an implied promise to pay. *Held*, that

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such a promise must rest on facts and circumstances that would be incompatible with any other inference than that the parent intended to be regarded by the physician as his employer. Since there are no circumstances in this case indicative of such intention, judgment was properly rendered for defendant.

2. ———: ———: ———. The mere request from a father to a physician to attend a child of full age, and for whom he is not bound to provide, and though sick at the father's house, raises no implied promise upon his part to pay for such medical services.

3. ———: ———: ———: Services to be Rendered. A contract should be implied where the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for services to be rendered.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

AFFIRMED.

Scott J. Miller and *Jos. P. Fontron* for appellant.

Frank Sheetz and *Lewis A. Chapman* for respondent.

JOHNSON, J.—This is a suit on an alleged contract of employment to recover the reasonable value of services rendered by plaintiff as a physician and surgeon to the adult daughter of defendant. The answer contains a general denial and a plea of *res adjudicata.* In the view we have of the case it will not be necessary to notice the latter defense.

The cause was tried without the aid of a jury. The court made and filed findings of fact in which the issues of facts raised by the pleadings were decided in favor of defendant. Judgment was rendered accordingly and plaintiff appealed. No declarations of law were asked by either party. With the case in such posture our concern is not with the question of whether plaintiff adduced substantial evidence in sup-

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port of his pleaded cause, as would be the case were we dealing with a demurrer to the evidence, but is with the question of whether the findings of fact and resultant judgment are supported by substantial evidence. The court found as a fact that the services in question were not rendered under a contract with defendant. The evidence indisputably shows there was no express contract but plaintiff contends the services were performed under circumstances that implied an agreement on the part of defendant to compensate him and we shall consider that contention from the viewpoint that all of the controverted issues of fact have been settled in favor of defendant.

The facts to be considered thus may be stated: Plaintiff is a physician and surgeon practicing his profession in Kansas City. At the time the services in question were performed defendant was a widow living with her family in her homestead in Livingston county. Her daughter, Lucy, an unmarried woman over eighteen years of age was a member of her family. Defendant was the administratrix of her deceased husband's estate which then was in process of administration, and Lucy, as an heir of her father, had an interest in the estate of the approximate value of $1500. No distribution of the estate had been made and, as stated, Lucy was living with her mother in the old homestead. She fell ill and her condition became so serious that the local physicians who were treating her requested that plaintiff be called into consultation. A family council was held and all of the members of the family, including defendant and the sick woman herself, agreed that plaintiff should be called into the case. Nothing was said on the subject of his compensation and the local physicians who were present were directed to communicate with him. Accordingly one of the physicians telephoned plaintiff requesting him to attend a consultation at the home of defendant. Plaintiff complied with the request and at

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the end of the consultation defendant gave him her check for the amount of his bill. He talked with defendant about the case but the subject of his employment was not mentioned. The patient was suffering from an attack of appendicitis. A surgical operation was discussed and deferred on the advice of plaintiff who, at the conclusion of the consultation, returned home. Later he was recalled to perform the operation and did perform it at a hospital to which the patient was removed. His bill for the operation was $150, and was paid by defendant. Afterward a second operation was performed and still later a third. Plaintiff was not paid for the last two operations and this suit is for the recovery of the reasonable value of his services in performing them. Defendant testified and the court found that the payments made by defendant for the first two visits, though paid out of defendant's funds, were made for the patient at her request and were charged against her inheritance. The testimony of plaintiff tends to show that defendant promised to pay him for his services but this is denied by defendant and we must assume that no such promise was made especially when we find such conclusion expressed in the findings of fact.

Plaintiff's theory of an implied contract of defendant to become liable for his services must rest, therefore, on the facts that the patient was a member of defendant's family and that plaintiff's compensation for a part of the services rendered was paid by defendant apparently out of her own funds, though, in reality, out of funds belonging to the patient.

Defendant was under no legal obligation to provide her adult daughter with the services of physicians and had she called plaintiff into the case, that fact, of itself, would not have raised an implied promise on her part to become responsible for plaintiff's employment. The rule is well settled that "a mere request from a father to a physician to attend a child

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of full age, and for whom he is not bound to provide, and though sick at the father's house, raises no implied promise upon his part to pay for such medical services." [Rankin v. Beale, 68 Mo. App. 325; Meisenbach v. Cooperage Co., 45 Mo. App. 232; Jesserich v. Walruff, 51 Mo. App. 270; Crane v. Baudouine, 55 N. Y. 256; Boyd v. Sappington, 4 Watts (Pa.), 247; Morrell v. Lawrence, 203 Mo. 373; Smith v. Watson, 14 Vt. 332; Madden v. Blain, 66 Ga. 49; 1 Beach on Contracts, p. 788.]

Still less, say the court in Crane v. Baudouine, supra, may a promise be implied where there has been no special request by the parent to the physician and no more than an acquiescence in his calls. It was the duty of the plaintiff to know or to learn the true legal status of the patient and what were her true legal relations to the defendant. If we should hold that a parent could not be present in the sick room of his adult child and exhibit usual parental interest and anxiety without becoming liable to an attending physician called in by another at the patient's request, we would do violence to a wise and humane rule of universal recognition that has for its object the proper care of the sick and helpless. The only fact remaining on which an implied promise of defendant might be founded with any show of reason is that of the payment on behalf of the patient of plaintiff's first two bills. It is said by our Supreme Court in Morrell v. Lawrence, supra, that a contract should be implied where "the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered." In that case the father called the physician under circumstances, as pointed out in the opinion, clearly indicative of a purpose and assurance on his part that he would pay for the services, but here, plaintiff was called under circumstances

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that pointed to the patient as his only employer. The patient was too ill to attend to business affairs and naturally would be expected to select her mother as her agent. Had defendant paid plaintiff in money he would not have been justified in believing that she was using her own money and intended to be regarded as his employer or as acting in any other capacity than her daughter's agent. Certainly the mere fact that for convenience she gave him her own bank checks was no indication of a purpose to vary the ordinary legal relationships obtaining in such instances. It is a very common thing for an agent to make disbursements for his principal's account in such manner and plaintiff was not entitled to draw any special conclusions from the method of payment employed.

Plaintiff appears to have taken too much for granted. His cause is predicated upon presumptions he had no legal right to indulge. We do not say the parent of an adult child may not become bound to pay for medical services rendered the child upon an implied promise, but we do hold that such promise must rest on facts and circumstances that would be incompatible with any other inference than that the parent intended to be regarded by the physician as his employer. There are no circumstances in this case indicative of such intention and we conclude the learned trial judge committed no error in rendering judgment for defendant.

The judgment is affirmed. All concur.

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MARY L. NEWLAND, Respondent, v. MODERN WOODMEN OF AMERICA, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATION: Affirmative Defense: Suicide.** The plaintiff seeks to recover on a death benefit certificate issued to her husband, who committed suicide. The certificate stated there could be no recovery, if suicide was committed within three years after it was issued. This defense being affirmatively pleaded, the trial court found for plaintiff, on the ground that the defendant failed to plead and prove all the elemental facts of a valid defense founded on an exemption peculiar to such an association. *Held*, that the death of the husband was self-inflicted is a fact established beyond dispute as are also the facts on which the right of defendant to interpose the defense of suicide is predicated, and plaintiff was therefore not entitled to recover.

2. **———: Pleading: Proof of License to do Business.** To be entitled to the benefit of the liberal laws and rules of construction pertaining to death benefit certificates issued by fraternal beneficiary associations, it devolves on such associations to plead and prove not only that they possess the essential qualifications of such societies, as prescribed and defined in Sec. 7109, R. S. 1909, but also, when incorporated in another state, that they have been admitted to do business in the State in the manner provided in Sec. 7112, R. S. 1909.

3. ———: ———: ———. The certificate of incorporation or that of authority to do business in this State, are not conclusive of the character of the business done, but must be proven by facts tending to show that the association is conducted as one which our laws define to be a benevolent association.

Appeal from Schuyler Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

REVERSED.

Benjamin D. Smith and *Bailey & Hart* for appellant.

T. L. Buford, and *Fogle & Fogle* for respondent

JOHNSON, J.—This is an action on a death benefit certificate issued by defendant September 11, 1905,

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to Isaac H. Newland, a farmer living near Lancaster in Schuyler county. Plaintiff who is the beneficiary designated in the certificate was the wife of Newland whose death occurred at his home January 29, 1906. All dues and assessments had been paid by him but defendant on receipt of proofs of death denied liability. This suit followed and the cause pleaded in the petition is one founded on an ordinary policy of life insurance.

The substance of the affirmative defenses alleged in the answer is that defendant is a fraternal beneficiary society incorporated in the state of Illinois and authorized to do business in this State; that the certificate in controversy is not an ordinary policy of life insurance, but is a fraternal beneficiary contract containing an express stipulation against suicide and that the death of Newland was self-inflicted. This answer was not assailed by demurrer or motion and the affirmative defenses were put in issue in a reply filed by plaintiff. A jury was waived and at the beginning of the introduction of evidence by defendant, counsel for plaintiff objected to "any evidence to support the allegations of their answer because it does not state facts sufficient to constitute any answer to plaintiff's petition." The objection was overruled "for the present" and the court heard evidence of defendant offered in support of the affirmative defenses. At the close of all the evidence the court, at the request of plaintiff, gave a declaration of law to the effect that under the pleadings and evidence, plaintiff is entitled to recover and rendered judgment accordingly. All the declarations of law asked by defendant were refused and after unsuccessfully moving for a new trial and in arrest of judgment, defendant appealed.

An analysis of the rulings of the court on the declarations of law asked by the respective parties, discloses that the judgment is based on the conclusion that defendant failed to plead and prove all the ele-

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mental facts of a valid defense founded upon an exemption peculiar to a fraternal beneficiary certificate and, therefore, that the certificate in question should be regarded and treated as an ordinary policy of life insurance against the enforcement of which the defense of suicide is not available.

To be entitled to the benefit of the liberal laws and rules of construction pertaining to death benefit certificates issued by fraternal beneficiary associations, it devolved on defendant to plead and prove not only that it possessed the essential qualifications of such societies as prescribed and defined in section 7109, Revised Statutes 1909, but also that being incorporated in another state, it had been admitted to do business in this State in the manner provided in section 7112, Revised Statutes 1909. [Gruwell v. Knights and Ladies of Security, 126 Mo. App. 496.] Further defendant was required to plead and prove that during the life of the certificate in controversy it had conducted its business affairs in this State in compliance with the provisions of the statutes relating to such societies. That is to say, that it had been carried on for the sole benefit of its members and their beneficiaries and not for profit; that it had maintained a lodge system in this State with ritualistic form of work and representative form of government; that it had made and given effect to provisions for the payment of benefits in case of death and had provided for the payment of benefits and expenses from assessments or dues collected from its members.

As is well said by the St. Louis Court of Appeals in Thompson v. Royal Neighbors, 154 Mo. App. l. c. 121. "Even the certificate of incorporation or that of authority to do business in this state, are not conclusive of the character of the business done. That is to be determined, in part it is true by an examination of the certificate issued, but it also rests on proof of acts outside of even the certificates; proof of facts

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tending to show that the association is conducted as one which our laws define to be a benevolent association."

This rule has not been impaired by the later decision of the Supreme Court in Armstrong v. Modern Brotherhood, 149 S. W. 459, 245 Mo. 153, wherein it is held that the ruling of the insurance commissioner in granting a foreign association license to do business in this State, though not conclusive of the qualifications of such association to operate in this State under the provisions of our laws, is entitled to great weight "where there is a real doubt as to the meaning of the law," since it is "the construction of the law placed upon it by the executive officer of the State charged with the duty of enforcing it." In cases such as the one under consideration the issues of the right of such foreign association to do business in this State and of its compliance with the requirements of our laws, under proper pleadings are subjects of judicial inquiry and determination, and the burden is on the association to show affirmatively that it has fully complied with the laws and is entitled to the benefits they confer. We, therefore, hold that in order to avail itself of the defense of suicide, defendant was required to plead and prove, not only that prior to the issuance of the certificate it had been incorporated in the state of its origin as a fraternal beneficiary society and, as such, had been licensed to do business in this State, but that its business had been conducted for the sole benefit of its members and their beneficiaries and not for profit; that it had maintained a lodge system with ritualistic form of work and representative form of government, had made provision for the payment of death benefits and had procured funds for the payment of benefits and expenses from assessments or dues collected from its members.

Turning to the answer which is very voluminous, we find a sufficient compliance with the rules of plead-

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ing we have just stated. Among other allegations are the following:

"Defendant further avers that it now is and was at all of the times herein and in plaintiff's petition mentioned, a fraternal beneficiary society as defined in the statutes of the State of Missouri, relating to fraternal beneficiary societies; that it is a corporation formed and carried on for the sole benefit of its members and their beneficiaries, and not for profit; that it has a lodge system with a ritualistic form of work and representative form of government, and makes provision for the payment of benefits in case of death of its members; that no provision is made for the payment of benefits in case of sickness, physical disablity or old age; that the fund from which the payment of benefits is made and the funds from which the expenses of the defendant society are defrayed are derived from assessment or dues collected from its members; that payment of death benefits is only made to the families, heirs, blood relatives or to persons dependent upon the member; that prior to and at the time of the issuance of the certificate herein sued on it has applied for admission to transact business as a fraternal beneficiary society under the statutes of the State of Missouri and that it has complied in all respects with the provisions and regulations contained in said Missouri statute relative to fraternal beneficiary societies organized in other states applying for admission to transact business in the State of Missouri, and that it now is and was at all times mentioned in the plaintiff's petition duly authorized by the Insurance Department of the State of Missouri to transact its said business in the State of Missouri as a fraternal beneficiary society under the provisions of 'An act defining and regulating fraternal beneficiary societies, orders, and associations providing penalties for violation thereof; approved March 16, 1897; now found and contained in article 2, chap-

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ter 12, of the Revised Statutes of Missouri for 1899;' and that at all the times mentioned in the plaintiff's petition and in this answer defendant was doing business as a fraternal beneficiary society under and in compliance with the laws of the State of Missouri pertaining to fraternal beneficiary societies, and that the certificate herein sued on was issued and delivered to the said Isaac H. Newland by the defendant in its regular course of business in the State of Missouri and in strict compliance with the laws of the State of Missouri relating to fraternal beneficiary societies and associations."

The principal objection to this part of the answer is that as to some of the constitutive facts it pleads only conclusions. This objection would have more merit had it been presented earlier in the case by demurrer or motion to make more definite and certain. Plaintiff did not assail the answer in such manner but waited until the trial and, after having joined issue, attempted for the first time to raise the question of the insufficiency of the answer by a general objection to the introduction of any evidence in support of the affirmative defenses. Such practice smacks of ambuscade and is not favored by the courts. We must consider the answer as thought it had been suffered to pass unchallenged until after verdict and apply to its allegations the most liberal rules of interpretation. The real question is whether or not it would support a judgment in favor of defendant and that question must be answered in the affirmative. Some of the allegations tested by the strict rules of construction applicable to a pleading attacked by demurrer might be subject to the criticism of being the statements of conclusions rather than of facts, but under the liberal rules of interpretation we should employ at this time, they should be accepted as sufficient statements of facts, since plaintiff, in joining issue, so regarded

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them and cannot be said in any wise to have been misled by them.

We regard the answer as properly raising the defense of suicide and we find the proof offered by defendant shows beyond question that defendant, prior to the issuance of the certificate, was a fraternal beneficiary society, duly admitted to do business in this State; that it was conducting its business in strict compliance with our laws and that the certificate was issued to Newland as a member duly admitted and initiated in one of the local lodges operated in this State. We cannot regard the argument that defendant failed to prove it maintained in this State a lodge system and representative form of government, as being supported by a reasonable understanding of the evidence which discloses very clearly that the business and operations of the defendant society are conducted on a uniform plan laid in conformity to the laws of this State, as well as to those of the State of Illinois, and that in detail, as well as in their general scope, the operations of defendant have the lodge system and representative government as their basic rule.

The evidence of defendant certainly supports its claim to the benefits of our laws pertaining to fraternal beneficiary societies and the learned trial judge erred in ruling to the contrary.

In the application for membership made by Newland appears the statement, "I further understand and agree that this society does not indemnify against death from suicide, sane or insane, if occurring within three years from date of certificate." The certificate contains the stipulation, "If the member holding this certificate . . . shall within three years after becoming a beneficial member of this society, die by his own hand, whether sane or insane . . . then this certificate shall be null and void and of no effect," etc. The by-laws in force at the time of the issuance of the certificate and thereafter, and which were ex-

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pressly made a part of the contract, contained the same provision. Therefore the terms of the contract made by Newland for the benefit of plaintiff expressly precluded a recovery by her in the event his death should occur within three years from the date of the certificate and be self-inflicted. The death occurred in that period and we turn to the question of its cause.

In the proofs of death sent by plaintiff to defendant, all of the witnesses whose affidavits were appended, including that of plaintiff, stated that the death of Newland resulted from suicide. This admission of plaintiff did not prevent her from contesting at the trial the issue of the cause of her husband's death, but she offered no evidence on that subject. Defendant read the deposition of the son of plaintiff and her deceased husband who was an eyewitness of his father's death. He testified that when he came into one of the rooms of their home he saw his father sitting in a chair with one of his children on his knee. In a moment his father put the child down, arose and went into the kitchen and shortly returned with a butcher knife which he was attempting to conceal beneath his coat. The witness asked him "what he was going to do and he never answered." He left the house and as he passed through the door began running towards the orchard. The witness followed but did not overtake his father who stopped when he had run, perhaps a hundred feet and twice cut his throat with the knife which, after starting to run, he no longer attempted to conceal. He died immediately from the effects of these self-inflicted wounds.

Thus it appears from undisputed evidence, as well as from the admission of plaintiff which she does not attempt to show was made under any misapprehension of the true facts of the tragedy or of the proper inference that should be drawn from them, that the cause of her husband's death was suicide, and we say the

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learned trial judge should have so held as a matter of law.

In the recent case of Richey v. Woodmen of the World, 163 Mo. App. 235, we discussed the question of question of whether or not the defense of suicide could be proved in law and came to the conclusion that the question should be answered in the affirmative. As we said in that case the presumption against suicide is very—strong as the universal instinct for life—but it may be overcome by proof, just as the instinct for life in instances may be overcome by a desire for death. Where the evidence of suicide is undisputed and is so strong that the opposite conclusion could not be said to have an evidentiary foundation but would be the product of mere conjecture or whimsical deduction, there is no issue to go to the jury, since the functions of the triers of fact are confined to the solution of controverted and disputable issues of fact and do not include the right to conjecture and guess about facts and inferences that are all one way and offer no ground for a reasonable difference of opinion.

That the death of Newland was self-inflicted is a fact established beyond dispute as are also the facts on which the right of defendant to interpose the defense of suicide is predicated. The court should have given the declaration of law asked by defendant to the effect that under the pleadings and evidence plaintiff is not entitled to recover.

The judgment is reversed. All concur.

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THOMAS A. GILLESPIE, Respondent, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **FIRE INSURANCE: Owner: Mortgage: Premium: Assignment** An owner of personal property gave a mortgage on it to secure a debt. He then took out a policy of insurance, with a clause that "loss was payable to the mortgagee, as his interest might appear." The policy expired and the insurance company's agent solicited the owner to renew it. He replied that he wanted it but had not the money to pay the premium, and asked the agent to see the mortgagee and get him to pay it. The agent did so and the policy, worded like the other, was delivered to the mortgagee. The property was destroyed by fire and the owner and mortgagee joined as plaintiffs in an action thereon. While the action was pending, the mortgagee was paid his claim and he then assigned all his interest to plaintiff, who filed an amended petition dropping the mortgagee as a party. It was *held* that the owner could recover the amount of the policy.

2. ———: ———: ———: **Pleading: Amendment: Practice.** In an action on a fire insurance policy with a clause "loss if any payable to mortgagee as his interest may appear," and the property is destroyed, and an action brought in joint names of the owner and mortgagee, and afterwards the mortgagee is paid his claim by the owner and assigns his interest to the owner, it is proper practice to then file an amended petition in the name of the owner alone.

3. ———: ———: ———: **Bad Faith: Attorney's fees.** When bad faith in the defense is shown, it is proper to allow the plaintiff an attorney's fee.

Appeal from Daviess Circuit Court.—*Hon. Arch B. Davis,* Judge.

AFFIRMED.

Barclay, Fauntleroy, Cullen & Orthwein for appellant.

E. M. Harber and *E. C. Orton* for respondent.

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ELLISON, J.—This action is on a policy of fire insurance for one thousand dollars. Plaintiff obtained judgment in the trial court.

It appears that plaintiff was indebted to one Buren, who held his note for twelve hundred and fifty dollars and mortgage to secure it on hotel furniture owned by plaintiff. That he had a policy on such furniture issued by this defendant for $1000, loss, if any, payable to Buren, mortgagee, as his interest might appear. That policy expired, and within a few days thereafter, on the 31st day of May, 1911, defendant's agent called on plaintiff and solicited him to renew it. Plaintiff then paid the balance of premium on the old policy, which to this time had remained unpaid, and stated to the agent that he wanted the policy but did not have the money (eighteen dollars) with which to pay the premium, and for the agent to go to Buren "and he will take the policy; he can't afford to let it expire and won't."

There is very little evidence in the case. It consists of the testimony of plaintiff himself and some written reports of the agent to the company and some letters from the company to the agent. It seems that the agent went to Buren and got the premium for the new policy. Neither of them were witnesses. But certain it is, the policy was issued in plaintiff's name as the insured, "the loss if any payable to Buren, mortgagee, as his interest might appear." Buren must have paid the premium, for it was shown to have been sent to defendant in one of the reports, and the policy was delivered to him, for it is so alleged in the petition, or, what is the same thing in legal effect, the agent may have accepted his promise and advanced the premium to defendant and deposited the policy in his safe for Buren. The fire occurred several weeks after the policy was thus issued and, if not already with one of them, it was then handed over either to

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Buren or plaintiff and suit was brought, both Buren and plaintiff joining as plaintiffs. After bringing this action, plaintiff Gillespie paid the amount of his indebtedness to Buren in this way: There was paid to Buren net amount (nine hundred and fifty dollars) arising from another policy, and then Gillespie settled the balance with him, and he then assigned his interest in this policy to Gillespie. Thereupon the latter filed an amended petition, omitting Buren as a coplaintiff.

From the foregoing it appears that defendant issued the policy in suit to plaintiff, insuring his property in the sum of one thousand dollars, loss payable to Buren as mortgagee as his interest might appear to be, and the premium was paid by Buren. Now it is true a mortgagee has an insurable interest which he may protect by insurance to himself, in his own name. But this was not that kind of a policy. Gillespie told the agent when the latter applied to him for renewal, that he wanted the policy, but had not the premium and for the agent to go to Buren and get it. The only claim Buren had, as is shown on the face of the policy, was as mortgagee with loss payable to him as his interest might appear; which means that if he should have no interest at time of settlement, the entire loss would be paid to Gillespie as owner. Defendant has not paid anything on the policy to the mortgagee and is free of any claim by him. It seems then that it should, in justice, pay the plaintiff; otherwise it would escape alogether.

The assignment of Buren's interest to plaintiff was introduced and objected to, but defendant insists that there was no proof of the assignment. That, however, was not made a ground of the objection. The objection is in effect a concession of the assignment, the only ground of objection being that it was inadmissible in evidence because it was assigned after the action was instituted.

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So it is said that the cause should have been tried on the case as it was when the action was begun, and since Gillespie was not the sole party in interest at the beginning of the action in his and Buren's name, a settlement with Buren and a transfer of his interest to Gillespie would not authorize the filing of an amended petition and the prosecution of the action in the name of Gillespie alone. It would have been a useless formality to have dismissed the case when Buren was paid and begin again in Gillespie's name alone. It was proper practice to file an amended petition dropping Buren and stating the facts. [Griswold v. Insurance Co., 70 Mo. 654, 658; see also Sec. 1924, R. S. 1909.]

An attorney's fee was allowed and it is claimed the case does not justify it under the cases of Blackwell v. Insurance Co., 80 Mo. App. 75; Rogers v. Ins. Co., 157 Mo. App. 671. In the first of these cases we said: "The insurer, so long as he acts in good faith and with reasonable ground to believe that the insured has not a legal demand may contest the claim in court as any other litigant, without fear of a penalty if it happens that his defense is not well founded. The refusal contemplated by the statute implies willfulness and a punishment is imposed."

But we have evidence in this case tending to show a want of good faith in the defense. A special agent of defendant wrote to it that it was liable, but he thought it best to make a show of contest, to force a compromise of the claim.

We have not discovered any error materially affecting the merits of the controversy. The cause was tried by the court without the aid of a jury, and no instructions were asked. Every intendment is with the judgment, and hence it is affirmed. All concur.

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STATE OF MISSOURI, Respondent, v. A. V. DOERRIES, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **CHANGE OF VENUE: Criticism in Presence of Jury.** It is prejudicial error for a trial court in sustaining a motion for a change of venue to a judge to be called in, to make an address in criticism of the practice, in the hearing of the jury, wherein the motive of the applicant is attacked.

2. **INDICTMENT: Lost Record: Supplied Paper.** If the record shows that there was no judgment or order supplying a lost indictment, it is error to allow a paper alleged to be a copy to be treated as a supplied paper.

Appeal from Callaway Circuit Court.—*Hon. John A. Rich,* Judge.

REVERSED.

Robertson & Robertson for appellant.

J. W. Tincher, C. M. Hay and *J. R. Baker* for respondent.

ELLISON, J.—Defendant was indicted and convicted of the offense of disturbing the peace. He appealed to this court and we transferred it to the Supreme Court on account of a constitutional question. That court thought the question not properly raised and returned the record to this court.

A change of venue was asked in the trial court on account of alleged prejudice of the judge. The change was granted and another judge called in. The judge to whom the application was made delivered a lengthy address, in the presence of the jury, on the evil practice of applications for change of venue. The exceedingly spirited character of the criticism was such as naturally to prejudice the jury. Doubtless the privilege of a change of venue, intended as it is for a just

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and beneficent purpose, is frequently abused. But the time of the criticism objected to was unfortunate. We passed upon an identical question in an opinion by Judge JOHNSON in which it was held to be prejudicial. [State v. Wright, 161 Mo. App. 597.]

It seems the indictment was lost and the trial is supposed to have proceeded upon one supplied. Unlike the case of State v. Walker, 167 Mo. l. c. 369, we cannot presume anything in this case, for the record sets out all that was done, and it does not appear that any motion for supplying a lost record was filed, or that any judgment or order for supplying it was made. Such judgment was necessary to supply the indictment. [State v. Burks, 132 Mo. 363; State v. Wilson, 200 Mo. l. c. 28.]

The judgment is reversed. All concur.

SYDNEY G. SANDUSKY, Respondent, v. WILLIAM J. COURTNEY, Administrator, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **PROBATE COURTS: Demands: Sufficiency of Statement.** A demand filed in the probate court against an estate, for legal services covering a period of over four years, stating that claimant's services consisted of managing the entire estate, loaning money, collecting interest, attending to renting and repairing real estate, buying and selling real estate, examining titles, drawing deeds and wills, making tax returns, appearing before the board of equalization, paying taxes, attending to business away from home at his own expense, giving legal advice whenever needed, and doing generally all necessary to be done in preserving the estate—and stating the reasonable value of such services—is sufficient, under Sec. 2119, R. S. 1909, after trial on the merits, to support a verdict and judgment for such services.

2. ———: ———: ———: **Trial on Merits: Waiver.** An objection to the sufficiency of a demand against an estate, raised by motion to make such demand more definite and certain, is waived by going to trial on the merits.

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Appeal from Clay Circuit Court.—*Hon. Francis H. Trimble,* Judge.

AFFIRMED.

Claude Hardwicke for appellant.

M. E. Lawson and *J. M. Sandusky* for respondent.

ELLISON, J.—The demand filed in the probate court was as follows:

"The Estate of Mary E. Dorsey, Deceased,
To S. G. Sandusky, Dr.

1910. To legal services rendered deceased from July 1st, 1904, to October 1st, 1908 (4 years and 3 months). Said services consisted of the management of the entire estate of deceased, both real and personal, amounting at the beginning of said services to about $45,000 and at their close to approximately $50,000. During the period of 4 years and 3 months aforesaid, claimant loaned all of the moneys of the deceased, collected the interest thereon, attended to most of the renting and repairing of her real estate, bought and sold real estate for her, examined titles, drew deeds and wills, had plat vacated and plat drawn and filed, gave in her property to the assessor, appeared before board of equalization for her, paid her taxes, attended to business away from home for her, paying his own expenses, gave her legal advice at all times when she needed it, and generally did for her all that was proper and necessary to be done in preserving her estate and making it increase in value.

Said services are reasonably worth, and claimant asks one and one-fourth per cent per year on $45,000, making $2,437.50."

The judgment in the probate court was in favor of plaintiff for $1300, and on his appeal to the circuit court there was a verdict and judgment in his favor

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for $1986.10, from which defendant has appealed to this court.

I think the statement filed before the probate court is sufficient. It is far come complete and much more specific than either of those held to be good in Wood v. Land, 35 Mo. App. 381; Monumental Bronze Co. v. Doty, 99 Mo. App. 195, and Britian v. Fender, 116 Mo. App. 93.

I think the case of Sidway v. Mo. Land & Live Stock Co., 163 Mo. 342, has no application, and that it should not be considered as authority on the question presented here. That case was an action begun in the circuit court, where formal pleadings are required; while this was begun in the probate court, where informal statements are permitted, the statute directing that a demand against an estate may be exhibited by serving the administrator with "a notice, in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded." [Sec. 194, R. S. 1909.] When this is done, it becomes the duty of the probate court to "hear and determine," the claim "in a summary way without the form of pleading." [Sec. 206, R. S. 1909.] In that case the trial court had ordered the plaintiff to make his petition more definite and certain. He attempted to do so, but, it seems, failed, and the trial court was asked to strike out his amended petition for failure to comply with the court's order. The court refused to strike it out and the Supreme Court thought it should have done so, stating, at page 375 of the report, that "the action of the lower court in refusing to enforce its original order, must therefore be held erroneous, and ground for reversal."

But the sufficiency of the statement of plaintiff's demand, as an original claim, is really not the question this appeal presents. The question is, not whether the demand originally was all that could be required, but will it support a verdict and judgment? The stat-

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ute (Sec. 2119, R. S. 1909) provides that: "When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, . . . reversed, impaired or in any way affected by reason of the following imperfections, omissions, defects, matters or things . . . ; eighth, for the want of any allegation or averment on account of which omission a demurrer could have been maintained; ninth, for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict; . . ." So, therefore, whenever a paper is filed which states a cause of action at all, however imperfectly, and a trial is had and verdict rendered, demurrable objections (save lack of jurisdiction and of stating a cause of action) are waived; and omissions of allegations which were necessary to prove in order to rightfully obtain the verdict should not be allowed to affect it. [State ex rel. v. Sullivan County Court, 51 Mo. 522; State ex rel. v. Webster, 53 Mo. 135; Knox County v. Brown, 103 Mo. l. c. 228; Bank v. Leyser, 116 Mo. l. c. 73; Duff v. Fire Assn., 56 Mo. App. l. c. 365; s. c., 129 Mo. 460; Thomasson v. Insurance Co., 114 Mo. App. l. c. 119, 120.]

The record in this case makes it peculiarly appropriate to enforce this rule. The defendant went to trial in the probate court without objection to the statement of the demand; therefore he must have perfectly understood the scope and detail of the claim. It was not until he reached the circuit court that he complained of indefiniteness of the statement of plaintiff's demand. In each of the trials (if we allow defendant did his duty in examining witnesses) plaintiff must have proved the things now said to have been defectively stated.

Defendant, however, insists upon a right to object to the sufficiency of the statement for the first time in the circuit court, where he did file a motion to require plaintiff to make his claim more definite

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and certain. If he intended to preserve that point, he should have stood upon his objection. By going to trial upon the merits, he waived it. [Ewing v. Vernon Co., 216 Mo. 681, 685; State ex rel. v. Bank, 160 Mo. 640, 646; White v. Railroad, 202 Mo. 539, 561; McMillen v. Columbia, 122 Mo. App. 34; Shuler v. Railroad Co., 87 Mo. App. 618, 622.]

In Ice & Cold Storage Co. v. Kuhlmann, 238 Mo. 685, 702, and White v. Railroad, supra, the Supreme Court have stated that when issue is taken on the merits it "means a sifting of the pleadings is over and that the line of battle is now pitched on the facts at a trial on the merits." And that "faults in a petition are waived (barring the two cardinal ones of stating a cause of action and lack of jurisdiction) whenever in the evolution of a lawsuit the case once advances to the stage of joinder of issue on the facts as pleaded."

In this case, under the informal procedure in probate courts, no answer was required, issue on the facts being joined by going to trial on the merits. For although defendant did file his motion to require plaintiff to make his petition more specific, definite and certain, yet, as I have just stated, by failing to stand on his motion, and going to trial, he waived it; "for it has become a commonplace of appellate procedure that answering over waives a motion to make more specific:" [Ewing v. Vernon Co., supra.]

I think we should affirm the judgment and it is so ordered. *Johnson, J.*, concurs. *Trimble, J.*, not sitting.

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IDA B. MILLER, Respondent, v. MISSOURI STATE LIFE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **ACCIDENT INSURANCE: Occupation: Supervisor: Labor.** It was stated in a policy of insurance that the assured's occupation was a contractor and that his duties were "traveling and supervising only." It was *held* that the term "supervising only" did not mean that he should totally abstain from labor; and that if he should discover the necessity of doing some temporary labor, and perform it, he would not lose his character as supervisor.

2. **———: ———: Policy: Hazard: Risk: Manual: Evidence.** A policy of accident insurance provided that if the insured suffered injury "while exposed to the hazard of an occupation classed by the company as more hazardous than that" stated in the policy, the liability should not exceed such portion of the principal as the premium paid would purchase at the rates fixed by the company for such more hazardous occupations. These more hazardous occupations and classifications of risks were set out in the company's manual, but this manual was not mentioned nor referred to in the policy. It was *held* that its introduction in evidence was properly refused.

3. **———: ———: Policy: Reference.** In order that provisions in the manual of an insurance company should become a part of the policy, they should be embodied therein or plainly and unmistakably referred to and pointed out.

4. **MOTION FOR NEW TRIAL: Waiver: Points and Authorities.** Objections saved in a motion for a new trial may be abandoned in the appellate court by the appellant, and if they are not mentioned in his brief of points and authorities, will be considered as waived.

Appeal from Johnson Circuit Court.—*Hon. A. A. Whitsett,* Judge.

AFFIRMED.

A. G. Moseley and *Hale Houts* for appellant.

J. W. Suddath & Son for respondent.

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ELLISON, J.—This action is based on a policy of accident insurance which was issued to Oliver Miller for three thousand dollars with plaintiff, his daughter, as beneficiary in case of his death by accident within the provisions of the policy. The premium was fifteen dollars. Plaintiff had judgment in the trial court.

The seventh paragraph of the policy is as follows:

"Hazard of Risk. (7). If the insured sustains injury, fatal or otherwise, while exposed to the hazard of an occupation classed by the company as more hazardous than that stated in the schedule of warranties, except ordinary duties about residence, the liability of the company shall not exceed such proportion of the principal sum or other indemnity under this policy as the premium paid by the insured will purchase at the rates fixed by the company for such more hazardous occupation."

The third and fourth paragraphs of the schedule of warranties referred to are as follows: "3rd—My occupations are, contractor, classed by the company as A. Pref. 4th.—My duties are traveling and supervising only."

Deceased's business was contracting for lighting and heating plants. At the time of his death a plant was being put in for a residence which would require the work of several men several days. Deceased was looking after other work being done, and he went to the place in question on the evening of the second day, intending to leave the next morning for another place; and but for his death would have left within an hour after. The trenches were dug and the tank put in, and as it did not seem to work properly, deceased was adjusting it and in doing so was stooping over it when an explosion occurred, throwing the lid against his face and killing him.

It will be noticed that the seventh paragraph above quoted provides that if an assured is injured

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while exposed to a risk more hazardous than that stated in the schedule of warranties, the liability will not exceed such portion of the amount named in the policy as the premium paid would purchase at the company's rates for such more hazardous occupation. That is to say, the applicant is insured for the full amount named in the policy, if killed in occupations named in the schedule of warranties; but if he is killed by a more hazardous occupation than that, the company will only pay what the premium would have bought for such class of occupation, at the rate fixed for such occupation.

The company claims that deceased, when killed, was in fact engaged in a more hazardous occupation than is specified in the schedule of warranties "a contractor working," and that it was an occupation in which the premium paid would purchase one-half the face of the policy, viz., $1500; and for that amount it conceded its liability. Plaintiff, on the other hand, insists that deceased's occupation at the time of his death was covered by the schedule of warranties, viz., that he was a contractor engaged only in supervising. It thus appears that the parties concede that deceased was a contractor, but differ as to what he was doing when killed, plaintiff insisting that he was supervising, and defendant that he was laboring.

The effect of defendant's position is that if one has a policy of accident insurance which states the insured's business to be a supervisor only, it is avoided if he, himself, does anything in the way of labor while occupying the position of supervisor. We think the language employed should receive that reasonable construction which it will be supposed business men of intelligence would intend. [Batten v. Modern Woodmen, 131 Mo. App. 381.] As has been stated, it is agreed deceased was a contractor, and we can see no sound reason for the assertion that a contractor loses his character as a supervisor because he sees the need

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of some temporary labor on his part to enable him properly to carry on his duty of supervision. In this case the evidence shows that deceased was directing or supervising the work and was not engaged as one of the laborers. If he had not been killed he would soon have left and gone to another place. The fact that after seeing the tank was not working properly he undertook to adjust it, so as to see if it would properly perform its function, did not destroy his capacity as supervisor within the meaning of the schedule of warranties. [Schmidt v. Insurance Co., 96 Wis. 304; Hall v. Insurance Co., 86 Wis. 518; Thorne v. Insurance Co., 106 Me. 274; Neafie v. Insurance Co., 55 Hun, 111; Batten v. Modern Woodmen, supra. In the first of these cases it is said that: "Supervising does not mean not working. On the contrary, it means, and would be naturally understood to mean, taking part in the work. Supervising indicates work, not idleness. It would be entirely consistent with supervising, if the deceased not only indicated how work was to be done, but actually took hold and assisted in the work when necessary or convenient."

In the second case it was held that "a grocer delivering goods," as expressed in a policy, meant one habitually doing so; and did not apply to one who occasionally delivered himself. In the third case it is held that where the insured's occupation is stated to be manager of a beef company, his duties being described as "office duties and traveling only," the insurer is liable for injuries received by the insured while in a refrigerator of the company directing the transfer of carcasses from one truck to another, and illustrating to the workmen how to do the work.

Defendant has presented an objection to the ruling of the trial court in rejecting an offer of evidence. It had what is termed a "manual," giving definitions of terms and classifications of risks. It contained the company's definition of the words and terms "occu-

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pation" and "contractor working," as well as "contractor supervising only." Plaintiff concedes that if these definitions are to be considered as controlling in the construction of the policy, she would only be entitled to recover half the sum named in the policy, for the classification of risks made under such definitions puts plaintiff's claim in a class which would entitle her only to recover that amount. The manual giving these definitions was not a part of the policy, nor was it mentioned or referred to therein; yet if its provisions were to have the effect desired by defendant, they would have become one of the principal parts of the contract. To have had this effect they should have been embodied in the face of the contract, or referred to therein and made a part thereof in plain unmistakable terms. [McDonald v. Insurance Co., 154 Mo. l. c. 628, 629; Elliott v. Safety Fund Life Ins. Co., 76 Mo. App. 562; 1 Joyce on Insurance, sec. 191.] We have no doubt of the correctness of the trial court's ruling.

Some objections to the instructions for plaintiff, as well as those refused for defendant, are covered by what we have written. Others we think technical and unsubstantial. Many suggestions made by defendant by way of objections are matters which stood admitted. There were some other objections as to testimony, but we are satisfied in view of the fact that no fraud was pleaded, that no error was committed. We have covered substantially all questions made in defendant's brief as disclosed by its points and authorities.

We are satisfied no error was committed materially affecting the merits of the case, and that the judgment was for the right party, and hence affirm it. All concur.

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ADOLPH SOMMER, Appellant, v. W. A. BRYSON, Respondent.

Kansas City Court of Appeals, February 17, 1913.

TRIAL BY COURT: Instructions: Presumption. Where a cause is tried by the court without a jury and no instructions are asked to indicate the theory of law entertained by the court, it will be presumed to be a correct one, and if there is any substantial evidence tending to support the finding, the judgment will be affirmed.

Appeal from Jackson Circuit Court.—*Hon. Jas. H. Slover,* Judge.

AFFIRMED.

Williams, Hunter & Guffin for appellant.

G. W. Duvall for respondent.

ELLISON, J.—Plaintiff's action, begun before a justice of the peace, is based on a claim of $59.53 and interest due on a guaranty by defendant of certain merchandise, and interest "on personal account," all aggregating $66.88. Defendant filed a counterclaim for "commissions" in the sum of $300 and interest at six per cent from December 15, 1910. On appeal to the circuit court plaintiff was allowed $64.96 and defendant allowed on his counterclaim $326.25. Plaintiff thereupon appealed to this court.

Whatever merit there may have been originally in plaintiff's objection to defendant's counterclaim, there is none at this stage, after the facts have been found against him on a trial properly conducted. There were no instructions asked and the trial was without a jury.

It seems that plaintiff manufactured a product known as "viscol" and that defendant was his exclusive agent for its sale in Kansas City and vicinity,

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under a contract dated December 1, 1904. Plaintiff claims that this contract was abandoned or superseded by one dated November 10, 1905, and that therefore defendant's counterclaim based on the first contract should not have been allowed. But there was evidence tending to show that each party regarded the first contract as in force for several years after the alleged second contract. Furthermore, there was evidence tending to prove that the paper designated as the second contract was not regarded as a contract signed by both parties, but more in the nature of a bond.

There was ample evidence tending to support the charge made by defendant for commissions. Where no instructions are asked to indicate the trial court's view of the law, it will be presumed that it took the correct view. [Bethune v. Railroad, 139 Mo. l. c. 580; Gibson v. Bailey Co., 114 Mo. App. 350, 357.]

The objection to testimony was not well taken. Finding no error affecting the merits of the action, the judgment is affirmed. All concur.

RAY G. HARRIS, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **PERSONAL INJURY: Collision: Humanitarian Rule.** Where the driver of a covered wagon drives onto a street car track where a car is approaching from the rear, the place being such that the motorman must have seen his peril in time to have stopped the car, and yet collided with the wagon and injured him, the street car company is liable in damages under the humanitarian rule.

2. **———: ———: Vigilant Lookout: Ordinance: Common Law.** It is the duty of a motorman driving a street car in a populous part of a city to keep a vigilant lookout for vehicles, even though there is no municipal ordinance to that effect. Such duty is required by the common law.

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3. ———: ———: **Instruction: Damages: Maximum Sum.** It is not improper in instructing on the measure of damages, to state that the verdict could not exceed the amount of damages claimed in the petition.

4. **DAMAGES: Excessive Verdict: Remittitur.** Where the plaintiff's injury in a collision with a street car is confined principally to his foot and the injury to that consists of a fractured bone at the instep, with torn ligaments, leaving the instep slightly enlarged and somewhat less elastic, but with full capacity to walk, and he resumed his work within three months, it was *held* that a verdict for $5000 was excessive, and a remittitur was required.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield,* Judge.

AFFIRMED (*conditionally*).

John H. Lucas and *Chas. N. Saddler* for appellant.

E. R. Morrison and *James E. Nugent* for respondent.

ELLISON, J.—Plaintiff was injured in being thrown from his wagon in a collision with one of defendant's street cars on Thirty-first street in Kansas City. He brought this action for damages and recovered judgment in the trial court.

The drift of the evidence and the instructions require the case to be considered from the standpoint of the humanitarian doctrine. It appears that plaintiff was the driver of a one-horse delivery wagon, with a covered top, for a merchant in Kansas City, and in the performance of his duties he had stopped at one of the residences on the north side of Thirty-first street between Troost avenue on the east and Harrison street on the west. After making delivery there, he came out and looked east towards and beyond Troost avenue for a car. He did not see any and as he intended

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going to Harrison street he drove slowly about fifteen feet diagonally south and west onto the street car track, and thence directly west along and on the track for about seventy-five feet when he was overtaken by one of defendant's cars which struck his wagon, turned it about and then upset it onto him.

As plaintiff's horse was old, gentle and slow, some little time elapsed after he looked for a car and before he turned across onto the tracks and had proceeded the distance stated. There was a car line on Troost avenue which the Thirty-first street cars must cross, and they made a safety stop at that place. It is down grade from Troost to Harrison and nothing could prevent the motorman from seeing plaintiff's wagon, if he looked at all, from the time he would start up, after his stop, to cross Troost avenue. The wagon being a covered one with its rear to the motorman, its position, its slow progress and the direction it was going was a suggestion to any reasonably careful motorman to look out that he did not strike it. There was direct evidence showing he could have stopped his car in time, but the face of the whole evidence for plaintiff and the conceded facts are abundantly sufficient for the reasonable inference that he had ample time to have slowed down his speed after he must have observed plaintiff's peril, and thereby have averted the collision. The evidence in defendant's behalf tends to show a sudden and unexpected turning onto the track by plaintiff and a collision which it was impossible to avoid. But on a demurrer to testimony we are not concerned with defendant's showing, so long as the evidence for plaintiff is not in conflict with physical facts and is within the bounds of reason.

The instructions are without fault. It is said in criticism of No. 1 for plaintiff that it stated the duty of the motorman to be to keep "a vigilant watchout ahead," when there was no ordinance of the city requiring such watch. This objection is tantamount to

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saying that in the absence of a municipal ordinance it is not a want of ordinary care if a motorman does not keep a vigilant watch for vehicles in thickly settled portions of a city. But we think it is; and that an ordinance to that effect is but an affirmance of what reasonable prudence requires of those who handle such dangerous agencies in a city as a rapidly running street car. [Senn v. Southern Railroad Co., 108 Mo. 142, 148; Sluder v. Railroad Co., 189 Mo. 107, 136; Deschner v. Railroad Co., 200 Mo. 310, 329; Sepetowski v. Railroad, 102 Mo. App. 110, 119.]

The amount of damages asked in the petition was fifteen thousand dollars, and plaintiff's instruction submitted that as the sum which could not be exceeded in the allowance of damages. This has been an old time practice and it is now too late to undertake to interfere with it, at least through the courts. [Partello v. Railroad, 217 Mo. 645.]

The instructions given for defendant put every phase of the defense in clear language and they left nothing to be added to which it was entitled. Some offered were refused, but, as just said, the case was fully covered by those given. Number nine might have been well enough if the substance therein had not been included in what had been given, especially in No. 1, and in the last hypothesis stated in plaintiff's No. 1. It seems to us idle to say the jury did not have a full and clear understanding of the case.

The amount of plaintiff's verdict (five thousand dollars) is all that has given us any concern. His injury was temporary and trivial except to his foot. As to the condition of that, and its effect upon him, the parties seem to be in substantial accord except as to the amount of damages. He was kept from his labor not quite three months at which time he resumed work for his employer, for two weeks in some other department, and then he resumed his delivery serv-

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ice. The surgeon who attended him testified that the bones of the instep were dislocated and the ligaments were lacerated and broken, and that possibly some of the bones were fractured, though it was "a little hard to determine just what kind of a fracture." He said the bones had become more rigid and that "whatever motion there is in the instep is more rigid and not so elastic." He further stated that "the first bone on the instep leading to the large toe, is elevated and thickened." He thought the stiffness would never entirely disappear. Answering the question: "Is there any great tendency to injury?" he answered, "Nothing excepting for the foot being more awkward, stumbling, something of that sort." He further stated that he had the use of his foot but that there is some impairment.

We have concluded that the verdict is far in excess of that allowed in cases of greater injury. That it is out of proportion to sums heretofore thought proper in the Supreme and appellate courts of this State. Therefore, if plaintiff will remit $2000 within ten days, the judgment will be affirmed; otherwise it will be reversed and the cause remanded. All concur.

LEO N. LESLIE, Respondent, v. HENRY W. TIERNAN, Appellant.

Kansas City Court of Appeals, February 17, 1913.

PLEADING: Justices of the Peace: Statement: Sufficiency. The following statement before a justice of the peace was *held* to be sufficient to invoke the jurisdiction of the justice:

"Plaintiff for cause of action states that defendant is indebted to him in the sum of three hundred dollars for moneys advanced and actually paid by plaintiff for and on account of

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defendant at his instance and request, as rent on certain real estate on the southwest corner of Eleventh street and Locust Street in Kansas City, Missouri.

Wherefore, plaintiff prays judgment for three hundred dollars."

Appeal from Jackson Circuit Court.—*Hon. Jas. H. Slover,* Judge.

AFFIRMED.

C. W. Prince and *E. A. Harris* for appellant.

Geo. S. Bryant, Jr., for respondent.

ELLISON, J.—Plaintiff's action was begun before a justice of the peace. It was appealed to the circuit court, where he recovered judgment. Defendant has brought the case here without a bill of exceptions, contending that the record proper will support his appeal.

The sole insistence is that the following paper did not state a cause of action in sufficiently definite terms to invoke the jurisdiction of the justice:

"Plaintiff for cause of action states that defendant is indebted to him in the sum of three hundred dollars for moneys advanced and actually paid by plaintiff for and on account of defendant at his instance and request, as rent on certain real estate on the soutwest corner of Eleventh street and Locust street in Kansas City, Missouri. Wherefore, plaintiff prays judgment for three hundred dollars."

We regard the statement as ample. [Moore v. Harmes, 123 Mo. App. 34; Johnson v. Kahn, 97 Mo. App. 628.]

It seems defendant regards the cause of action as on an account and that it should have been accompanied by dates, etc. But, as stated by plaintiff's counsel at the argument, the claim is not like a mercantile account; and while dates might be a matter of

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interest between defendant and his landlord, it did not concern plaintiff. The face of the statement shows that defendant requested plaintiff to pay for him three hundred dollars rent for certain real estate and that he did so. No more was necessary.

The judgment was for the right party and is affirmed. All concur.

BERKSHIRE LUMBER CO., Respondent, v. J. S. CHICK INV. CO. et al., Appellants.

Kansas City Court of Appeals, February 17, 1913.

1. **MOTION TO ELECT: Answer: Waiver.** Objection to an adverse ruling on a motion to elect, is waived by filing an answer and going to trial.

2. **ACTION: Joint Obligation: Single Defendant.** Though the petition declares on a joint obligation against several defendants, and the evidence only shows an obligation of a single defendant, judgment may be had against him.

3. **MECHANIC'S LIENS: Statement: Account: Exhibit.** It will be sufficient if the mechanic's lien statement filed with the clerk refers to the account filed therewith and attached thereto. The account need not be copied in the body of the lien statement.

4. **ORDER OF TESTIMONY: Discretion.** The trial court has large discretion as to the order of the testimony and where the plaintiff has been permitted to introduce evidence in chief, after defendant had closed, no harm being shown to have resulted, it is not a cause for reversal.

5. **MECHANIC'S LIEN: General Contract: Evidence.** If there is one general contract to furnish material for buildings on contiguous lots, one mechanic's lien can be filed covering all the buildings.

6. **———: Material: Owner: Dissatisfaction.** If proper material is furnished under the contract and put in the building, it is properly allowed in full as a lien, though the owner becomes dissatisfied and has a part of it torn out.

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Appeal from Jackson Circuit Court.—*Hon. Jos. A. Guthrie,* Judge.

AFFIRMED.

Sebree, Conrad & Wendorff for appellants.

Ellis, Cook & Barnett for respondent.

ELLISON, J.—Plaintiff's action is to enforce a mechanic's lien for lumber and material alleged to have been furnished to defendants Herrick and Kays. The other defendants are parties interested in deeds of trust against the property involved. There was a judgment enforcing the lien.

There was a motion by defendants to require plaintiff to elect. The motion was overruled. We cannot listen to defendants' complaint of that action; for they afterwards filed an answer and went to trial on the merits and thereby waived error, if any, on the motion. [White v. Railway Co., 202 Mo. 539; Hanson v. Neal, 215 Mo. 256, 270.]

It is claimed that as the suit was brought for a joint obligation of Herrick and Kays and the proof was of an individual debt against one of them, there was a failure to prove the joint cause of action alleged. But the case of Bagnell Timber Co. v. Railroad, 180 Mo. 421, supporting that view, was overruled on second appeal (242 Mo. 11), and again in Hutchinson v. Richmond Safety Gate Co., 152 S. W. 52.

Defendants next attack the sufficiency of the lien statement filed with the clerk of the circuit court as provided by section 8217, Revised Statutes 1909. That statute requires, among other things, that "a just and true account of the demand" shall be filed. The objection here is that the account is not set forth in the body of the lien statement. The account is not copied into the statement, but it is referred to and made a

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part of the statement as an exhibit, in the following terms: "That true and itemized statements of the materials so sold, furnished and used in and upon said terms: "That true and itemized statements of the materials so as aforesaid returned or not used and credited thereon, are hereto attached, marked 'Exhibit A,' pages 1 and 2, and 'Exhibit B,' pages 1 and 2, hereby referred to and made parts of this lien statement." This we think was sufficient. The account, as thus attached to the statement and made a part thereof, was filed and was thereafter subject to as satisfactory examination by all concerned as if set out in the body of the statement. There is a class of cases, which defendants have cited, to the effect that an exhibit filed with a petition is not a part of it. But a lien statement herein considered is not a pleading. It is a notice, and if filed as was this one, serves its purpose.

After plaintiff's case was closed and the evidence for defendants had been heard, the court permitted plaintiff to introduce evidence which it is claimed should have been introduced in the first instance as evidence in chief. The order of testimony,—permission to a plaintiff to introduce evidence at the close which is not rebuttal, is a matter largely in the discretion of the trail court. We do not discover any abuse of such discretion in the present instance.

It is provided by section 8237, Revised Statutes 1909, that when the improvement upon which it is sought to fasten a lien, consists of two or more buildings, etc., "erected under one general contract," one lien proceeding will suffice, and that it will not be necessary to file separately against each building. This subject has been discussed by the Supreme Court in Walden v. Robertson, 120 Mo. 38, and by the Courts of Appeals in Kick v. Doerste, 45 Mo. App. 134; Deardorff v. Roy, 50 Mo. App. 70; Bolen Coal Co. v.

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Ryan, 48 Mo. App. 512; Lumber Co. v. Brewing Co., 78 Mo. App. 230.

It is claimed by defendants that the evidence fails to show "one general contract;" but on the contrary shows two separate contracts. That was an issue in the case which was properly submitted to the jury. We have examined the record and find that there was evidence and circumstances tending to support plaintiff's claim of one general contract, and feel the conclusion of the jury should not be disturbed.

It seems that a small portion of the flooring was not satisfactory to defendants after it had been laid, and it was torn up. But the jury found it was of the kind and quality ordered. If put into the building and then torn out, the loss should not be put upon plaintiff.

We have not found anything to justify a reversal and the judgment is accordingly affirmed. All concur.

STATE OF MISSOURI, Respondent, v. MARY E. WHITE, Appellant.

St. Louis Court of Appeals, December 3, 1912.

1. **CRIMINAL SLANDER: Gist of Action: Intent.** The gist of the action of criminal slander is the intention of the defendant in uttering the words.

2. **———: Accusing Female of Adultery: Intent: Instructions.** In order to constitute an offense under Sec. 4817, R. S. 1909, providing that every person falsely or maliciously charging or accusing any female of adultery or whoredom, by falsely speaking concerning her in the presence of others any false words imputing any such offense, shall be guilty of a misdemeanor, the words spoken must impute lack of chastity, and if it appears from the circumstances under which they were uttered that they were not intended or to be understood as imputing lack of chastity, but were intended and to be understood as terms

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of abuse or vituperation, the uttering of them does not constitute the offense; and hence, in a prosecution under this section, where the evidence tended strongly to show that the words uttered by defendant were used as terms of abuse, it was reversible error to refuse an instruction requested by defendant which declared the law as above set out.

Appeal from Mississippi Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED.

Gresham & Moore for appellant.

The court erred in refusing instruction numbered one offered by the defendant. The gist of a slander case is the intention of the defendant in uttering the words. The very essence of the offense is speaking false and slanderous words impugning the female's character. Instruction number one given by the court on its own motion, unaccompanied by any explanation of malice and intent falls short of the whole law and is reversible error. State v. Boos, 66 Mo. App. 539; State v. Collins, 117 Mo. App. 58.

J. M. Haw, Prosecuting Attorney, and *George H. Traylor* for respondent.

The cases cited by appellant to sustain her third contention, that instruction numbered one offered by the defendant should have been given, are not applicable. Neither of them sustains her contention. In this case there was a total lack of any testimony on which to base such an instruction. There was no defense or testimony offered by appellant to show that the words used were mere ejaculations of anger and were not intended by her to be understood in their usual and natural sense, or that they were used as terms of reproach. The defense was that the words were not used. The mere use of the words charged to defendant constituted slander by express statutory enactment (R.

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S. 1909, secs. 4817 and 5424; State v. Santhuff, 131 Mo. App. 620), and it devolved upon defendant to show that they were true or were spoken innocently (Israel v. Israel, 109 Mo. App. 366); and having attempted to do neither defendant was not entitled to the instruction mentioned. State v. Gartrell, 171 Mo. 489. Instruction numbered one, given by the court on its own motion, covered all of the elements of the offense and was sufficient.

CAULFIELD, J.—The defendant appeals from a conviction and fine of $500 under section 4817 of the Revised Statutes of Missouri, 1909, which provides that, "every person who shall falsely and maliciously charge or accuse any female of . . . adultery or whoredom, by falsely speaking of and concerning such female, in the presence and hearing of any other person or persons, any false and slanderous words which shall impute to her any such offense, . . . shall be deemed guilty of a misdemeanor."

The evidence tended to prove that the defendant and Mrs. Walker occupied adjoining farms and on several occasions the latter's cattle had gotten into defendant's wheat field. On the last one, defendant's father and hired man undertook to put the trespassing cattle into defendant's lot near her house. Mrs. Walker with her little ten-year-old girl arrived on the scene about the time the men were driving the cattle into defendant's back lot. This back lot had three gates, one from the field, another into another lot called the front lot, and another out into the public road. Mrs. Walker stood at the gateway leading into the road and asked defendant's father to turn the cattle out and let her take them home. This he refused to do, and proceeded to drive them on through the back lot into the front lot. About this time Mrs. Traylor, the other prosecuting witness, came along with her little girl, and ascertaining the trouble, advised Mrs. Walker to

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go in and get her cattle. Both the women and Mrs. Walker's little girl then went into the defendant's back lot, and Mrs. Walker opened the gate leading into the defendant's front lot where the cattle were. Then Mrs. Walker and her little girl went into the front lot and commenced to drive the cattle out, while Mrs. Traylor stood at the gate.

Mrs. Walker's version, on direct examination, of what happened about this time is as follows: "A. Mrs. White said, 'Don't open that gate.' I said, 'All right, come on, Sarah, we will let them alone.' Q. Sarah, who is that? A. My girl; so Sarah started, and Mrs. White came running to the door—came running out of the door, saying, 'Don't open that gate; don't you open that gate; I will shoot you; I will set my dogs on you, you dirty, whoring—' Q. State the very words. A. 'You dirty, whoring bitches you; I will shoot you; I will set my dogs on you.' Hair flying, and she came running towards us, she stooped on her right side and pulled up her clothes something near her knee and pulled a pistol from her clothes, and came running, and when she put her hand to the gate is when I saw it was a pistol; and I was waiting for my girl to come out and get in front of me before I started. She said, 'Get out of here'. I said, 'All right, Mrs. White.' My girl runs crying, saying 'Run, mamma—' Judge O'Bryan: Object to her telling about what the girl did. A. She said, 'Yes, sir, you get, run.' I said, 'Mrs. White, give me time, I am going,' and she said, 'Get' and was hissing the dog, calling us bad names every few words she spoke, saying, 'You dirty whoring bitches.' She said she would shoot the hair off of our head. She would call us 'You dirty, whoring bitches.' "

On cross-examination she said that defendant had called her and Mrs. Traylor "whoring bitches" as many as seven or eight times; that defendant talked so fast witness could not say how many times; that wit-

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ness was badly frightened; that defendant said, pointing her finger, "I mean you, Mrs. Walker and Mrs. Traylor, both of you" and also said that the Walkers, Foresters and Traylors had been running over her. That defendant talked and fussed so much that witness could not tell all she said. Mrs. Traylor added that defendant also called them "dirty, low-down dogs" and said that the Forresters and Traylors "had run over her, and now the Traylors and Walkers were trying to run over her, but they couldn't do it."

We think the foregoing is fairly indicative of the circumstances and manner in which the alleged slander occurred according to the State's theory. Mrs. Walker was corroborated by Mrs. Traylor and the two little girls.

The defendant and her hired man, Ben Chandler, the latter by deposition, testified in her behalf as to the particular incident in question. Their testimony tended to prove that the defendant did not have a pistol or urge the dog on the two women and children and did not use the language attributed to her. According to Chandler, "Mrs. White said, 'get out of the lot and let the cattle alone.' Mrs. Walker made the remark that she was going to take the cattle. Mrs. White told her she wouldn't get them and said, 'get out of the lot and stay out.' Mrs. Walker said, 'all right, Mrs. White,' and she went out; and Mrs. White said, 'you had better be at home tending to your own business and cleaning up your filthy house instead of being up here trying to attend to mine;' and they went off." The defendant's testimony is to much the same effect.

There was also considerable uncontradicted testimony to the effect that four or five years before defendant had suffered such a serious mental derangement as to necessitate her removal to the State insane asylum. A physcian testified that her mental derangement was of the periodical type—that is, was liable to recur from time to time.

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The defendant was refused an instruction to the effect that "if the jury from the evidence and circumstances in evidence, believe that the words spoken by the defendant were uttered by her in anger, as terms of abuse and reproach to the said Susie Walker and Sadie Traylor and was not intended as the truth, and was understood by the hearers as being mere terms of abuse and uttered in anger, and not intended to charge them with whoredom, then the jury should find for the defendant." In our opinion such instruction should have been given. In cases of criminal slander, the gist of the action is the intention of the defendant in uttering the words. [State v. Boos, 66 Mo. App. 537]. The words used must have imputed lack of chastity to the woman or women mentioned. [State v. Collins, 117 Mo. App. 658, 94 S. W. 325.] If it is apparent from the circumstances under which the words were uttered that they were not intended or to be understood as imputing such lack of chastity, but were intended and to be understood only as mere terms of abuse or vituperation, then the uttering of them does not constitute criminal slander. [See Bridgman v. Armer, 57 Mo. App. 528.] Though we are not quite prepared to say that the evidence on the part of the State showed conclusively that the words complained of were used as mere terms of abuse and not to impute lack of chastity, it had, to say the least, a strong tendency in that direction and amply justified the giving of the instruction asked.

The judgment is reversed and the cause remanded. *Reynolds P. J.*, and *Nortoni, J.*, concur.

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EDWARD McDONNELL, Respondent, v. COLUMBIA TAXICAB COMPANY, Appellant.

St. Louis Court of Appeals, December 3, 1912.

NEGLIGENCE: Instructions: Roving Commission. In an action by a pedestrian for injuries received by being struck by a taxicab in a street, where the petition counted on specific acts of negligence in running the taxicab at a dangerous rate of speed and in failing to check its speed or give plaintiff warning of its approach, an instruction, authorizing a verdict for plaintiff if the jury believed that the taxicab was being run at "a greater rate of speed than was reasonable" *or* that the driver "at said time was not using the highest degree of care that a very careful or prudent person would use under like circumstances . . . , and that by reason thereof, plaintiff was struck by said taxicab," was reversible error, in that the latter part did not confine the jury to the negligence alleged, but allowed them to return a verdict on any theory they might construct or evolve out of their own minds.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams,* Judge.

REVERSED AND REMANDED.

Charles E. Morrow for appellant.

Plaintiff's instruction number 1 is erroneous for the reason that it does not confine the jury to the acts of negligence alleged in the petition and sought to be established by the evidence. After setting out specific acts, the instruction states, "or that said driver of said taxicab at said time was not using the highest degree of care that a very careful person would use under like or similar circumstances in running said taxicab, and that by reason thereof the plaintiff was struck and injured by said taxicab, then the jury will find for the plaintiff." This is clearly a roving commission to the jury to find any failure to exercise the highest degree of care "in running said taxicab."

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This was a clear departure. Allen v. St. Louis Transit Co., 183 Mo. 411; Sommers v. Transit Co., 108 Mo. App. 319; Mulderig v. Railroad, 116 Mo. App. 655; Miller v. United Rys. Co., 155 Mo. App. 528; Hales v. Raines, 162 Mo. App. 46, 141 S. W. 917. The plaintiff, having alleged specific acts of negligence, is limited to the specific acts charged. This rule obtains where a general averment of negligence precedes the averments of specific acts of negligence in the petition. Chitty v. Railroad, 148 Mo. 75; McManamee v. Railroad, 135 Mo. 440; Waldhire v. Railroad, 71 Mo. 514; McCarty v. Hotel Co., 144 Mo. 397.

Johnson & Young for respondent.

STATEMENT.—This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant. Plaintiff recovered and defendant prosecutes this appeal.

The place of the injury was at the crossing over Broadway on the north side of Chouteau avenue in the city of St. Louis; the time about 8:25 o'clock p. m., after dark. Plaintiff's evidence tended to prove that the place was one where street car passengers transferred from one car line to another; that there was a great deal of traffic there; that it was customary for the Broadway cars to stop at that particular crossing to let passengers off; there was an electric street lamp near; that, while plaintiff was attempting to pass from the front end of a southbound Broadway street car, which had stopped to let him off, to the west curb of Broadway, he was run down and injured by defendant's automobile, which was then being driven by defendant's employee acting within the scope of his employment. Plaintiff testified that, after alighting and before starting toward the curb, he took the precaution to glance to the north (whence the automobile came) and saw no vehicle coming, though there was

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nothing to obstruct his view. The first plaintiff knew of the automobile was when it struck him, there having been no warning sound of its approach, though it seems to have had its lights burning. It was coming south in the same direction with the car, and attempted to pass along between the car and the curb, a space some eighteen feet in width, and was running along within two feet of the side of the car, when it struck plaintiff. As to the speed of the taxicab, the motorman on the street car testified that it was running at a "pretty good speed," and another witness for plaintiff estimated its speed at fifteen miles an hour. The testimony of other witnesses tended to prove that plaintiff was paying no attention to vehicles, but looked straight ahead of him as he went toward the west curb. The driver of the automobile testified that, before he neared the crossing, he was going about twelve miles an hour, and that when he got to the car, he was only traveling between three and four miles an hour; that it was customary for southbound cars to stop on the south side, and not on the north side, of cross streets, and that he had no idea, and there was nothing to indicate to him, that anybody was going to get off of that car at that place at that time; that, seeing plaintiff step off the front platform of the street car; he tried to stop the automobile by shutting off the power and putting on the brakes, but that it was then too late to avoid injuring plaintiff.

The portions of plaintiff's petition relied upon as charging defendant with negligence are in substance as follows: It first states that "one of the defendant's said vehicles, going at a great rate of speed, to-wit, at a speed of fifteen miles per hour, . . . was negligently and carelessly, and without warning, run against and over the plaintiff, knocking him down." It then states "that the said Broadway and Chouteau avenue are and have been for many years last and

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past public streets and thoroughfares in the city of St. Louis; that the said Broadway runs in a southerly direction and that the said Chouteau avenue runs east and west and crosses said Broadway at right angles, and at the intersection of said Broadway and Chouteau avenue is a public business place where numerous people pass and repass, especially during the evening hours at about the hour when the plaintiff was injured." The petition then pleads that there were then in full force and effect in the State of Missouri certain statutory provisions, sections 8519 and 8523 of the Revised Statutes of Missouri, 1909.

Section 8519 provided in pertinent part that,

"No person shall operate a motor vehicle on any public highway at a greater rate of speed than is reasonable, having regard to the traffic and use of the highway, or so as to endanger the life and limb of any person, or the safety of any property, and shall not in any event, while upon any public highway, run at a greater rate of speed than fifteen miles an hour; . . . . and within the limits of all cities, towns and villages the rate of speed shall not be greater than eight miles per hour in the business portion of any city, town or village, and not greater than ten miles per hour in all other portions thereof."

Section 8523 provided that,

"All persons owning, operating or controlling an automobile running on, upon, along or across public roads, streets, avenues, alleys, highways or places much used for travel, shall use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury or death to persons on, or traveling over, upon or across such public roads, streets, avenues, alleys, highways or places much used for travel. Any owner, operator or person in control of an automobile, failing to use such degree of care, shall be liable in damages to a person or property injured by the failure of the owner, operator or person

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in control of an automobile to use such degree of care, . . . unless the injury or death is caused by the direct negligence of the injured or deceased person contributing directly thereto."

The petition then proceeds as follows: "Plaintiff further states that said striking, running over and injuring him by said automobile or taxicab of the defendant was directly due to and caused by the negligence on the part of the employee of the defendant operating and running said vehicle, and was a direct violation of said act, while running said vehicle upon, along and across said public streets in the city of St. Louis, Missouri, which public streets were at said time and for years had been highways and places much used for travel, and the defendant, through its said employee, failed to use the highest degree of care that a very careful person would use under like circumstances to prevent injuring all persons on or traveling over, upon or across said public streets in the following particulars, to-wit: (1) That the defendant, through its said employee, did negligently operate said automobile or taxicab along said Broadway, going south and at the time it struck the plaintiff, in a reckless and at dangerous rate of speed. (2) That defendant, through its said employee, did negligently operate said motor vehicle on said Broadway going south at and before the time it struck the plaintiff in a reckless manner and at a rate of speed exceeding fifteen miles as hour and when approaching this said crossing on Broadway north of Chouteau avenue failed to check the speed of taxicab or give warning of its approach whatsoever, and by reason thereof plaintiff was run over by the defendant's said taxicab receiving the injuries herein complained of."

The answer, in addition to a general denial, contains a plea of contributory negligence. The reply was a general denial.

The only reference to the question whether the col-

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lision occurred in the "business portion" of the city occurs in the cross-examination of plaintiff as follows: "Mr. Morrow (defendant's counsel) (Q.): Mr. McDonnell, that point there isn't what is known as a business point, I understand— business part of the city—not like down town here; that is just simply a point where the people transfer there? A. Well, go ahead. Mr. Young (plaintiff's counsel): Answer the question. A. Well, yes; yes."

At the instance of the plaintiff the court gave an instruction to the jury as follows:

"1. The court instructs the jury that if they believe and find from the evidence that on the 5th day of March, 1910, at about the time charged in the petition, the plaintiff while passing from a street car at the north crossing of Broadway and Chouteau avenue, in the city of St. Louis, was run against and over by one of the defendant's taxicabs, driven by one of its employees, going at the time at a greater rate of speed than eight miles per hour, or, that the driver of said taxicab was running the same at a greater rate of speed than was reasonable, having regard to the traffic and use of said streets at said point, or that said driver of said taxicab at said time was not using the highest degree of care that a very careful person would use under like, or similar circumstances, in running said taxicab, and that by reason thereof the plaintiff was struck and injured by said taxicab, then the jury will find for the plaintiff."

There were other instructions, but as they do not have any tendency to cure the alleged errors in the foregoing one of which defendant complains, we will not encumber this opinion by setting them forth.

CAULFIELD, J. (after stating the facts).—The defendant contends that the giving of plaintiff's instruction No. 1, was reversible error, and we are constrained to hold such contention good. Though in his petition plaintiff relies on specific acts of negligence

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to entitle him to recover, this instruction omits to hypothesize the facts with respect to the alleged negligence of the driver of the taxicab, and leaves the jury to find for the plaintiff if they find "that said driver of said taxicab at said time was not using the highest degree of care that a very careful person would use under like or similar circumstances, in running said taxicab." It is true that, in the prior part of the instruction, the question of the speed of the automobile is specifically submitted to the jury, but the portion we are considering is stated in the alternative, to the end that, even though the jury might have found the driver guiltless in the matter of unlawful or negligent speed, it might still find for plaintiff, if the driver failed in any manner whatever to use the highest degree of care in running the taxicab. As the Supreme Court said in condemning a similar instruction, this one was "equivalent to authorizing the jury to return a verdict for the plaintiff under any theory of negligence which they could construct or evolve out of their own minds." [Allen v. St. Louis Transit Co., 183 Mo. 411, 432, 81 S. W. 1142.] In this respect the giving of this instruction constituted reversible error. Where, as here, specific acts of negligence are relied upon, the instructions should require the jury to find whether the defendant was guilty in the respect charged and not submit the question in such general terms. [See Miller v. United Railways Co., 155 Mo. App. 528, 134 S. W. 1045.]

Another objection made to this instruction is, that it in effect declares the defendant guilty of negligence as matter of law if the automobile was going at "a greater rate of speed than eight miles an hour," without requiring a finding that the place was in the "business portion" of the city as the statute invoked contemplates (R. S. Mo. 1909, sec. 8519), or that that rate of speed was negligent under the circumstances. As the judgment must be reversed and a new trial had

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for the reason first above mentioned, we need not pass upon this second objection, which is one that can easily be avoided upon a retrial. For the same reason we do not now notice other matters of alleged error.

The judgment is reversed and the cause remanded. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

LOUIS MARKEL, Appellant, v. STEPHEN PECK et al., Respondents.

St. Louis Court of Appeals, December 3, 1912.

1. **TRUSTS: Action for Breach of Contract: Liability of Trust Estate: Forum: Court of Law or Equity.** Trust property cannot be reached in an action at law to recover damages for the breach of an executory contract, but can be reached only in equity.

2. **———: Personal Liability of Trustee: Contract made by Co-trustee.** A minority trustee is not personally liable on a contract which he did not personally make, authorize or adopt, merely because a majority of the trustees authorized it.

3. **———: ———: ———: Effect of Power Given Majority to Govern.** A provision in a will creating a trust and giving the trustees power to sell or lease the trust estate, that a majority of the trustees shall govern, concerns only the matter of binding the estate and does not render the minority personally liable on contracts made or authorized only by the majority.

Appeal from St. Louis City Circuit Court.—*Hon. Walter B. Douglas*, Judge.

AFFIRMED AND REMANDED.

Taylor R. Young and *Frank H. Haskins* for appellant.

S. T. G. Smith and *Thomas S. Meng* for respondent.

For synopsis of briefs, see same case, 144 Mo. App. 702.

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STATEMENT.—The appeal in this case was prosecuted to the Supreme Court, by which it was transferred to this court. Thereafter it was transferred by this court to the Springfield Court of Appeals, where an opinion was rendered therein. [See Markel v. Peck et al., 144 Mo. App. 701, 129 S. W. 243.] Subsequently the Supreme Court declared the legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional, and the cause was transferred back to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings in the Springfield Court were *coram non judice.*

The case has been argued and submitted here, and, upon due consideration, we prefer to dispose of it upon the same theory as did the trial court, the parties by their counsel, in the argument before us, seeming to concede that our decision should depend upon the correctness or incorrectness of that theory.

This is an action at law against certain persons as trustees under the last will of Charles H. Peck, deceased, wherein the plaintiff seeks to recover damages for breach of an executory contract for future leases of real property forming part of the trust estate. Under the will, the trustees are given "full power subject to the exceptions and limitations hereinafter named, to manage, rent, lease, sell and dispose of" the property belonging to the trust estate. The exceptions and limitations named do not pertain to the renting or leasing of property. The will provides that "in all cases where said trustees are by this will empowered or required to do anything, the majority of them, except where otherwise specified, shall govern, and the act of such majority shall be valid," etc. The trust is limited to continue until the expiration of fifteen years next after the death of the last surviving one of the testator's descendants living at the time of his death, at which time the *corpus* is to be divided

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equally, *per capita*, between the testator's descendants then living. In the meantime, the trustees are to pay the income in divers parts and proportions to some twenty-two or more persons, including the defendants and their descendants.

The contract in suit was made and entered into under the date of March 6, 1903. It was not signed by the defendants, but by "Stephen Peck & Bro., Agents." By its terms said Stephen Peck & Bro., purporting to act "as agents of the estate of Chas. H. Peck, deceased," agreed to deliver to plaintiff two leases, one for a term to begin April 1, 1903, and the other for a term to begin September 1, 1907. The petition alleges that defendants entered into said agreement "through their lawfully authorized agents, Stephen Peck & Brother." The defendants denied the execution of the contract by answer, verified by affidavit. It is conceded that Stephen Peck, who is one of the trustees and a member of the firm of Stephen Peck & Bro., signed the contract in the name of said firm, and there was evidence *pro* and *con* as to whether the other three trustees authorized him or his said firm to do so.

An instruction given at the instance of plaintiff permitted a verdict for the plaintiff if the defendants, or "a majority of them," authorized the firm of Stephen Peck & Bro. to execute the contract. The verdict was in favor of the plaintiff and against all of the defendants. The trial court sustained defendants' motion for a new trial on the ground that the giving of said instruction was error. The plaintiff has appealed, assigning as error the action of the court in granting a new trial.

CAULFIELD, J. (after stating the facts).—At the time of sustaining the motion for a new trial, the learned trial judge, in a memorandum filed, stated the legal theory influencing his action, as follows:

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"This is an action at law against certain persons as trustees under the last will of Charles H. Peck, deceased. Though the case was tried on the theory that a judgment was sought against the trustees as such, yet neither the petition nor the judgment so limits the case. In both the petition and the judgment the word trustees, when used as descriptive of the parties, is properly to be taken as merely *designatio personae*. That no recovery could be had in this action against the trust estate is, I think, unquestionable. The plaintiff's case is against the individuals who wronged him. If he be unable to obtain satisfaction from them, after obtaining a judgment he may in a proper proceeding and upon a proper showing have his judgment made a charge against the trust property. Notwithstanding the fact that the parties may have had in their minds an erroneous theory of the case, if the pleadings, instructions and judgment make a case, when tested by the proper theory, the judgment should stand. As I have stated above, there is nothing in the pleadings or the judgment which would justify the claim that this action, or its result, in any way exceeded the power of the court. A judgment in effect against the trust property would exceed that power. Proceeding to an examination of the instructions, I find that the first instruction tells the jury that all of the defendants are bound by the acts of a majority of them. The pleadings show no relation between these defendants, other than that of co-trustees. There is no law which authorizes the majority of a set of trustees to bind the minority in such a way as to render them or him liable *de bonis propriis*, in a case such as this. This instruction, therefore must necessarily be based upon the theory that the act of the majority was binding upon the trust fund in this action. That theory being clearly erroneous, the court erred in giving the instruction marked (1), and because

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of such error the defendants' motion for a new trial must be sustained."

We agree with the conclusion so stated by the learned trial judge. Trust property cannot be reached in an action at law to recover damages for breach of an executory contract. It can be reached solely in equity. [Moore v. Stemmons, 119 Mo. App. 162, 95 S. W. 313.] This being so, the only judgment, if any, which could be rendered in this action would be one based on the personal liability of the trustees, and, of course, a minority trustee or trustees could not be rendered personally liable on a contract which he or they did not personally make, authorize or adopt, merely because others, composing a majority of the trustees, did authorize it. The provision of the will, that a majority shall govern, etc., clearly concerns only the matter of binding the estate and cannot be given the effect of rendering the minority personally liable on contracts made or authorized only by the majority. Whether, then, this instruction allows a recovery against the trustees solely in their representative capacity, or allows a recovery against all if a mere majority authorized the contract sued upon, in either event it was erroneous, and the trial court was right in granting a new trial on that account.

The judgment is affirmed and the cause remanded. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

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EDWARD ROENNIGKE, Respondent, v. LOUIS ESSIG, Appellant.

St. Louis Court of Appeals, December 3, 1912.

1. **PRINCIPAL AND SURETY: Building Contract: Failure of Principal to Sign Bond: Liability of Surety.** Where a builder's contract appeared on one side of a printed sheet and the bond for performance on the other, each instrument aptly referring to the other and contemplating that the contract by its terms should be parcel of the bond, and the principal signed the contract, the surety on the bond was bound thereby, although the principal did not sign it, since the principal was bound in the first instance by the contract and the bond showed that it was a complete instrument when executed by the surety alone.

2. **———: ———: Failure of Obligee to Retain Stipulated Percentage: Discharge of Surety.** Where a building contract stipulates that the owner shall withhold from the contractor a percentage of the contract price as a security against liens and until such liens are settled, the surety on a bond, conditioned upon the performance of the contract and the payment of all lien claims by the contractor, is discharged if the owner surrenders this security without his consent; but where a building contract provides that the owner shall, during the course of construction, pay the contractor a certain percentage of the contract price, and that the retained percentage shall be paid to him ten days after the building is completed and on its acceptance by the owner, and the owner pays the contractor the retained percentage ten days after the building is completed and on its acceptance by him, the surety on a bond, conditioned upon the performance of the contract and the payment of all lienable claims by the contractor, is not thereby discharged from liability for lienable claims subsequently paid by the owner, since the retained percentage was paid in accordance with the contract, and the surety, under the terms of the contract and bond, consented to its being so paid.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams,* Judge.

AFFIRMED.

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Eugene Buder for appellant.

(1) A surety's liability is one *strictissimi juris* and cannot be extended by implication or presumption beyond the strict terms of the bond. Harris v. Taylor, 150 Mo. App. 291; Reissaus v. Whites, 128 Mo. App. 135; Beers v. Wolf, 116 Mo. 179; Gray v. Davis, 89 Mo. App. 450; Earth v. Allen, 55 Mo. App. 107; Kiessig v. Allspaugh, 13 L. R. A. 418. (2) Where a building contract provides that the owner, who is also the obligee in a bond given to secure the performance of the building contract, should not pay more than 75 per cent of the contract price to the contractor as the work progressed, and the owner at any time paid more than the 75 per cent as the work progressed, a surety on the bond is discharged. Evans v. Graden, 125 Mo. 72; Tinsley v. Kemery, 111 Mo. App. 87; Taylor v. Jeter, 23 Mo. 244; Martin v. Whites, 128 Mo. App. 117; Harris v. Taylor, 150 Mo. App. 291. (3) Where a building contract provides that the owner, who is also the obligee in a bond given to secure the performance of the building contract, is to retain and hold 25 per cent of the contract price, as security for the faithful completion of the work in the liquidation of any damages under said contract, and for the purpose of furnishing the owner a release from any lien or right of lien, and the owner fails to hold and retain said 25 per cent as in the contract provided, the surety is discharged from liability on the bond. Evans v. Graden, 125 Mo. 72; Tinsley v. Kemery, 111 Mo. App. 87; Taylor v. Jeter, 23 Mo. 244; Martin v. Whites, 128 Mo. App. 117; Harris v. Taylor, 150 Mo. App. 291. (4) Where a bond given to secure the performance of a building contract required the signatures of the contractors named in the building contract, and the contractors failed to sign the bond, the sureties in the bond are discharged. Brown v. Jetmore, 70 Mo. 228; Gay v. Murphy, 134 Mo. 98; Association v. Obert, 169 Mo. 507; Bjoin v. Anglin, 97 Minn. 326.

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Carl Otto for respondent.

The body of the bond shows no other signatures were intended except Essig and Schweitzer and Essig signed intending to bind himself. The *testimonium* clause will be rejected as not sensible or reasonable. The bond referred to the contract and the contract referred to the bond and they thereby become one contract. Haddaway v. Post, 35 Mo. App. 278; Bishop on Contracts (2 Ed.), sec. 347.

NORTONI, J.—This is a suit on a builder's bond. The finding and judgment were for plaintiff, and defendant surety on the bond alone prosecutes the appeal.

Henry A. Christophel and W. H. Pearson contracted in writing with plaintiff to furnish the materials and erect a building for him at the agreed price of $6200. Among other things, the contract stipulated the building was to be completed and delivered to plaintiff free of all liens, etc. In connection with this contract and in assurance of its fulfilment, defendant Essig, as surety, executed the bond in suit in the amount of $6200, whereby he bound himself to answer for the default of Christophel and Pearson in respect of any matter stipulated for in the contract. After settling with the contractors on the certificate of the architect, plaintiff was required to expend $516.87 in liquidation of lien claims against the building, and prosecutes this suit upon the bond to recover therefor.

It is first argued the court should have directed a verdict for defendant Essig, the surety, for the reason that the names of Christophel and Pearson, principals, were not affixed to the bond. It appears the building contract and the bond in suit were executed by the use of printed forms both on the same sheet of paper. In other words, the builder's contract is printed on one side of a sheet of paper and the bond for the faithful

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fulfilment of the contract on the reverse side thereof. Each of these documents in apt terms refers to the other. Christophel and Pearson, contractors, together with the plaintiff, signed and executed the contract. The bond, on the reverse side of the sheet, however, is not signed by Christophel and Pearson, but they are referred to in the body thereof as the contractors and as the principals who signed the above contract, the provisions of which the bond undertakes to assure. However, it is obvious from the form of the bond that it was not contemplated that the contractors, Christophel and Pearson, should do more than sign the contract, which, by the terms of the two writings, became parcel of the bond. In other words, it appears from the papers themselves that it was not contemplated the principals should affix their signatures to the bond, provided they signed, as they did, the builder's contract on the reverse side of the sheet. Some of the authorities declare that where the principal omitted to sign a common law bond, when it clearly appeared that the parties contemplated that he should so sign it, the sureties were not bound, though they had affixed their signatures thereto. The theory with respect to such cases is, that as the contract of suretyship is secondary in its nature, there is no obligation entailed against the surety unless the principal is bound in the first instance. But the rule is without force here, for it is obvious that the principals, Christophel and Pearson, were bound to the faithful execution of the contract, and the contract is parcel of the bond. This contract stipulates the full and identical obligation which the surety undertook to assure. From this it appears the principals, Christophel and Pearson, were bound in the first instance and, therefore, Essig, the surety, was bound by signing the bond to the secondary obligation. The bond, printed on the same sheet with the contract, reveals that it was a completed instrument when executed by the surety alone.

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The precise point has been heretofore determined in a case involving a like contract, as will appear by reference to North St. Louis Planing Mill v. Essex, 157 Mo. App. 18, 137 S. W. 295. There can be no doubt that on the face of the bond the surety's obligation was valid and complete.

The builder's contract provides, among other things, that the plaintiff should pay, during the course of construction, to the builders not to exceed seventy-five per cent of the contract price and retain a balance of twenty-five per cent thereof as security against possible liens, etc., and that the final payment of this twenty-five per cent should be made ten days after the building was completed and on its acceptance by plaintiff. All payments were to be made on the certificate of J. L. Wees, architect and superintendent of the building. It appears that plaintiff made payments on the contract in accordance with this agreement on the certificate of the architect and retained twenty-five per cent of the contract price until ten days after the building was completed, when, upon its acceptance, the remaining twenty-five per cent of the contract price was paid to the contractors on the certificate of the architect. It is argued the court should have directed a verdict for defendant surety on the ground that plaintiff released the security in his hands by paying out the remaining twenty-five per cent of the contract price without regard to the probable liens that might be run upon the building. There can be no doubt that when the contract stipulates the owner shall withhold from the contractor a percentage of the contract price as a security against probable liens and until such lien claims are settled, without more, the surety is discharged if the owner surrenders this security without his consent. [Such is the doctrine of Evans v. Graden, 125 Mo. 72, 28 S. W. 439; Harris v. Taylor, 150 Mo. App. 291, 129 S. W. 995.] But the rule invoked is wholly without influence here, for it appears con-

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clusively that the surety consented to the payments being made by plaintiff, for the contract stipulates the course to be pursued. It cannot be said that the surety, Essig, did not consent to the payments of the final twenty-five per cent of the contract price ten days after the completion of the building upon the certificate of the architect, Wees, for the contract in plain and pointed terms stipulates that the final payment should be made upon such certificate and that such payment was authorized when such certificate was given. Obviously, the surety consented to this, for the contract, in all its terms, is parcel of the obligation between the parties and it was the course prescribed for plaintiff to pay the balance of the contract price in accordance with the contract on the certificate of the architect, as he did. Though by so doing plaintiff released a security in his hands, it is entirely clear that this security was released with the consent of the surety and in full accord with the terms of the contract and bond, for he was authorized to pay out this fund upon the certificate of the architect.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

PHIL POLLACK, Appellant, v. NATIONAL BANK OF COMMERCE IN ST. LOUIS, Respondent.

St. Louis Court of Appeals, December 3, 1912.

1. **BANKS AND BANKING: Checks: Time for Payment: Negotiable Instruments.** A check is payable on demand, and if nothing more appears, the bank on which it is drawn must either pay or reject it on presentment.

2. **———: ———: ———: Extending Time by Agreement: Custom: Negotiable Instruments.** A depositor who presents a check for deposit drawn by another depositor may make a valid agreement with the bank that payment shall be deferred

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for a reasonable time, until the bank can ascertain whether or not there are sufficient funds of the drawer in its hands to pay it; and such an agreement may be established from a custom to that effect, which was well known to both parties and obtained in good faith throughout an extended course of dealing between them.

3. ———: **Deposit of Checks: Right of Bank to Charge Back Worthless Checks: Custom: Negotiable Instruments.** Where a depositor of a bank presented to it, for deposit, a check drawn by another depositor, with knowledge of a custom of the bank to give the depositor credit for checks deposited, subject to the right of the bank to reject the deposit and charge the amount back to the depositor at any time during the same day, if it discovers that the drawer of the check has not sufficient funds on hand to pay it, the depositor was estopped from asserting that the bank, after giving him credit for the deposit, could not, on the same day, on finding insufficient funds to pay the check, charge his account with the amount thereof.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow,* Judge.

AFFIRMED.

Geo. E. Smith and *Phil Pollack* for appellant.

(1) Where a check drawn upon a bank is presented to it by the holder, for deposit to his credit, and the amount is credited to the holder, the legal effect is precisely the same thing as though the money were first paid out to him, and then by him deposited in the bank.

It is the right of the bank to refuse to pay it, or it may reject it conditionally, but if it accepts the check as valid, and pays out the money (or what, as some authorities hold, is the same thing, credits it to the holder's account), it cannot at any time thereafter, even on the same day, return the check on discovering that there were no funds to meet it and cancel the transaction, for the collection is then treated as accomplished. 2 Daniel Neg. Insts., p. 648, sec. 1621;

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Bank v. Burklfardt, 100 U. S. 686; Bank v. Miller, 185 Fed. 338; Oddie v. Bank, 45 N. Y. 735; Bank v. Lloyd, 90 N. Y. 530; Cragie v. Hadley, 99 N. Y. 131; Bryan v. Bank, 205 Pa. St. 7; Bank v. Burns, 68 Ala. 267; Wasson v. Lamb, 120 Ind. 514; Bank v. Gregg, 138 Ill. 596; Kirkham v. Bank, 165 N. Y. 132; Hoffman v. Bank, 46 N. J. L. 604; Terhune v. Bank, 34 N. J. Eq. 367; Bartley v. State, 53 Neb. 338; Roofing Co. v. Mitchell, 117 Ga. 772; Billingsly v. Pollack, 69 Miss. 759; Bank v. Devenish, 15 Colo. App. 229; Cavanaugh v. Bank, 59 Mo. App. 547; Noble v. Doughten, 72 Kan. 336; Aebi v. Bank, 124 Wis. 73; Bank v. Fuel Co., 58 Minn. 141. (2) Our own courts observe the distinction between a general deposit of paper credited as cash on the books of the bank and a special deposit received for collection. In the first instance the title passes to the bank, and the depositor may draw against it at once as so much cash. Handley v. Refinery Co., 106 Mo. App. 20; Cavanaugh v. Bank, 59 Mo. App. 547; Ayres v. Bank, 79 Mo. 421; Bullene v. Coates, Idem, 426; Flamery v. Coates, 80 Mo. 444. (3) The supposed custom pleaded by defendant as existing among the banks of St. Louis is illegal and void. Of the custom of banks to present the checks of other banks in the same place through the clearing house for collection, this court says: "In this case the check was duly presented at the proper (bank) counter, and nothing more could be required to fix the liability of the drawer. It may be added that a custom, however well established, can never operate to discharge a liability which the law has created. It may operate the relinquishment of a right, because that is within the competency of the party who by bringing himself within the custom is understood to consent to the relinquishment." Kleekamp v. Meyer, 5 Mo. App. 448; See, also, Bank v. Bank, 151 Mo. 331; Cotton Press Co. v. Starard, 44 Mo. 82; Ober v. Carson, 62 Mo. 214; Martin v. Mill Co., 49 Mo. App. 30.

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Edward D'Arcy for respondent.

(1) Checks deposited with a bank and credited in the depositor's pass book, are taken, in the absence of special agreement, for collection and not as cash, and may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another. Bank & Trust Co. v. McDonald, 51 Cal. 64; Peterson v. Bank, 52 Pa. St. 206; Boyd v. Emerson, 2 Ad. and El. 184; Kilsby v. Williams, 5 Barn. and Ald. 815; Morse on Banks and Banking, pp. 320, 321; Overman v. Bank, 31 N. J. L. 565; Rapp v. Bank, 136 Pa. St. 426. (2) The entry of a deposit in a pass book to the credit of the depositor (and apparently even where the entry is afterward made on the bank's books) is in the nature of a receipt, and is prima facie evidence that the bank has received the amount from the depositor and entered it to his credit. But it is not a contract to pay money, being but a receipt, and like any other receipt it is open to explanation *aliunde*. Quattrochi Brothers v. Bank, 89 Mo. App. 500. (3) The taking by a bank of a check on deposit is analogous to taking it through the clearing house, in which case it is held, unanimously we believe, that where the drawee bank receives a check through the clearing house, and enters it upon its journal to the credit of the payee bank, the check being afterward rejected and returned to the payee, and the entry annulled and the check charged back to the payee, within the time prescribed by the clearing house rules, such action does not constitute payment of the check, the filing and entry of the check being a mere conditional acceptance, subject to the right of the bank to annul the entry and return the check within the prescribed time. Bank v. Bank, 118 P. St. 309; 2 Daniel Neg. Inst. (5 Ed.) 650, n. 34. (4) The general usage of all or a majority of the banks in a place, town, city, or county,

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is held to be known to all in the community, and all who, though dealing elsewhere, enter into transactions which they must be presumed as men of ordinary foresight, to know will involve a dealing with or through the banks of such place. 1 Morse Banks and Banking (4 Ed.), sec. 9, p. 30; Mills v. Bank, 11 Wheat. (U. S.) 431; 1 Dan. Neg. Inst., sec. 662; Lawson, Usages & Customs, p. 53; Landa v. Bank, 118 Mo. App. 366.

NORTONI, J.—This is a suit to recover the amount of a deposit made by plaintiff in defendant bank. Upon the court overruling a demurrer to defendant's answer, plaintiff declined to proceed further and suffered a judgment of dismissal to go against him. From this judgment he prosecutes the appeal.

It is alleged in the petition that on September 30, 1910, and for a long time prior thereto, plaintiff was a depositor in the defendant bank, the National Bank of Commerce in St. Louis; that on said day he indorsed and deposited in defendant bank a check on said bank drawn by the Noonan Real Estate Company to his order, directing it to pay him $427.12; that the defendant bank received the check and entered the amount therefor in his pass book as a deposit and stamped the check with the receiving stamp, marked it "O. Z.," and passed it to its bookkeeper, who thereupon entered the same to his credit in the books of the bank; that on the next day defendant requested plaintiff to reimburse it for the amount of the check, as the drawer thereof, Noonan Real Estate Company, did not have sufficient funds in the defendant bank to cover the same, and that this the plaintiff refused to do. Thereupon defendant, against plaintiff's objection, wrongfully charged plaintiff's account with said sum of $427.12. On this state of facts, plaintiff seeks judgment on the theory that defendant bank became his debtor upon receiving the check and crediting it in his

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pass book and the books of the bank as though the same were a cash transaction.

Defendant bank, by its answer, denies that the demand for reimbursement and the charging back were made on the day following the alleged deposit, but admits that both plaintiff and the Noonan Real Estate Company, drawer of the check, were its customers and had for a long time theretofore each kept checking accounts therewith. It further pleads that there then was and for many years theretofore had been a usage and custom in the defendant bank and in all of the banks of the city of St. Louis, which is and was well known by their depositors and to plaintiff Pollack, to the effect that, notwithstanding checks may be received by the bank and credited in the pass book of the customer and the books of the bank upon presentation, whether drawn on that or any other bank, the transaction is in every instance subject to the right of the bank to reject the deposit and charge the amount back to the depositor at any time during the same day if the bank discovers the drawer of the check has not sufficient funds on deposit to pay the same. In other words, it is alleged in the answer that all transactions of this character are had between the bank and its customers subject to this custom and usage which obtains in defendant bank and in all of the banks of the city of St. Louis and is and was at the time well known to depositors of each bank and is and was at the time well known to plaintiff. The answer further sets forth that the Noonan Real Estate Company was without funds on deposit in defendant bank at the time of the presentment of the check and that this fact was discovered during the same day; that, upon the discovery of the want of funds of the drawer of the check, the bank immediately notified plaintiff thereof and charged the amount of the check back to him under the custom and usage above mentioned.

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Plaintiff interposed a demurrer to that portion of defendant's answer setting forth the custom and usage referred to, on the theory that, though such custom and usage obtained and notwithstanding his knowledge of the fact at the time the deposit was made, it constituted no defense at law. The court entertained a different view of the question, however, and overruled the demurrer as if such custom or usage so known to plaintiff at and before the time of the transaction justified the course of the bank in charging the amount of the check back to plaintiff during the same day.

It is argued defendant ought not to be permitted to introduce evidence tending to prove such custom and usage and plaintiff's knowledge thereof, for the reason that, if established in the proof, such custom or usage would infringe the law of commercial paper, which renders checks payable on demand. No one can doubt the essential characteristic of a check is that it shall be instantly payable on demand. In this respect a check is distinguishable from a bill of exchange, for the drawee of a bill is entitled to a reasonable time—at least one day—to determine whether he will pay or accept it. But as before said, a check is payable on demand, and, if nothing more appears, the bank upon which it is drawn should either pay or reject it upon presentment. [See Morse, Banks and Banking (4 Ed.), sec. 369; Chitty on Bills and Notes (11 Ed.), sec. 1, chap. 21, p. 353; 2 Daniel, Negotiable Instruments (5 Ed.), sec. 1566; McIntosh v. Lytle, 26 Minn. 336; State v. Vincent, 91 Mo. 662, 666, 667, 4 S. W. 430.]

But be this as it may, no one will contend for a moment that it is not within the province of the depositor presenting the check and the bank on which the check is drawn to expressly agree that the payment shall be deferred for a reasonable time, until the bank may ascertain whether or not there are sufficient funds of the drawer of the check in its hands to pay it. Such an agreement, instead of operating an infringement

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of the established rule of law above stated, amounts to no more than a reasonable modification of its application in the interests of justice. If it were competent for the parties to thus expressly agree with respect to the matter, it would seem to be competent, too, for them to tacitly do so under the established custom well known to both which obtained in good faith throughout an extended course of dealing. It is unnecessary to determine the force and effect of the usage or custom set forth, generally speaking, for the allegation of the answer is that plaintiff well knew it. The precise question with which the court is concerned and in judgment here, therefore, is this custom and usage which was well known to plaintiff and necessarily acted upon by him in dealing with the bank. If, at the time the check was presented, plaintiff knew of this custom, as alleged in the answer, and notwithstanding presented the check for deposit in the usual course, it would seem that the precepts of natural justice alone suggest that he should be bound thereby as if an express agreement to that effect were entered into, for, otherwise, grievous loss might be entailed upon the bank dealing with him on the faith of the usage and his knowledge of it. In such circumstances, the principle of estoppel intervenes to preclude plaintiff and save harmless the bank dealing with him in the utmost good faith, and this is true though the check presented for deposit is drawn upon the same or depositary bank as is the case here.

Touching the question of an express agreement or usage in such cases, Mr. Morse, in his work on Banks and Banking (4 Ed.), Vol. 2, sec. 569, says as follows:

"When a check is presented for deposit drawn on the depositary bank, the bank may refuse to pay it, or take *it conditionally by express agreement,* or by usage, if such a one exists, as in California; but otherwise, if it pays the money, or gives credit to the de-

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positor, the transaction is closed between the bank and the depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor. The giving of credit is practically and legally the same as paying the money to the depositor, and receiving the cash again on deposit. *The intent of the parties must govern*, and presenting a check on the bank, with a pass book in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash." (The italics are our own.) [See, also, State v. Salmon, 216 Mo. 468, 522, 523, 115 S. W. 1106.]

From what is said by Mr. Morse, it is obvious that an express agreement between the parties should prevail and that the *intent* of the parties must govern in every instance. As before said, it is unnecessary to rule here with respect to a general custom in the banks of St. Louis, for the case presents more than that, in that the answer avers plaintiff was fully informed as to such custom. This being true, the matter of the intention of the parties is one for the jury to determine, and if it were found as a fact that plaintiff knew of the custom at the time the check was presented for deposit, it is competent to find, too, from this fact that an agreement accordingly equivalent to an express one existed between the parties at the time. Touching this matter, the answer tendered a question of fact, which, if established, would constitute a valid defense, and the demurrer was properly overruled.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

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CAD S. WALD, Respondent, v. EMILE M. WALD, Appellant.

St. Louis Court of Appeals, December 3, 1912.

1. **DIVORCE: Custody of Children: Modification of Judgment at Subsequent Term: Procedure.** Under Sec. 2381, R. S. 1909, authorizing the court granting a divorce to review, at any time, any order or judgment awarding alimony or the custody of the children, the court granting a divorce retains jurisdiction as to the modification of a judgment touching the custody of the children, and this matter may be brought to the attention of such court by a motion in the original cause, at a subsequent term; such proceeding being a continuation of the original jurisdiction of the court touching the custody of the children.

2. ———: ———: **Wards of Court: Permitting Removal into Another Jurisdiction.** Where the custody of a child is awarded in divorce proceedings, it becomes a ward of the court, and the court should not permit it to be removed into another jurisdiction, unless its best interests require it.

3. ———: ———: ———: ———: **Modification of Judgment Awarding Custody, at Subsequent Term: Procedure.** Where a wife obtained a divorce and was awarded the custody of a child born of the marriage, a privilege given the husband by the decree to take the child out two days each week prima facie established a right in him to see it within the territorial jurisdiction of the court, and it was error for the court to sustain an objection to the introduction of evidence under a motion filed by him at a subsequent term, praying for a modification of the decree so as to award the custody of the child to him on the ground the wife was about to remarry and take it into another jurisdiction, since he was entitled to a hearing on the question of whether its best interests did not require that it be not removed from the jurisdiction of the court.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

REVERSED AND REMANDED.

Schnurmacher & Rassieur for appellant.

Where the custody of the child is awarded, in divorce proceedings, to the mother, the child neverthe-

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less remains the ward of the court. It is against the policy of the law to permit the child to be taken by the mother beyond the jurisdiction of the court, if the father, who resides here, is a suitable person and is able to properly take care of the child; and if the mother contemplates moving out of the city the custody of the child will be taken from her and turned over to the father. Miner v. Miner, 11 Ill. 43; Campbell v. Campbell, 37 Wis. 206; Chase v. Chase, 70 Ill. App. 572; Edwards v. Edwards, 84 Mo. App. 552; Jennings v. Jennings, 85 Mo. App. 290.

Henderson, Marshall & Becker for respondent.

(1) The sole issue raised by the demurrer is as to the legal sufficiency of the facts alleged in the pleading, and the demurrer admits only the truth of facts stated in said pleading, provided they are material, relevant and well pleaded, and does not admit inference from them nor conclusions of law. State v. Finn, 19 Mo. App. 560; Seed Co. v. Plant Co., 23 Mo. App. 579; Dannan v. Coleman, 8 Mo. App. 595; Bradley v. Franklin County, 65 Mo. 638; Kleekamp v. Meyer, 5 Mo. App. 444. (2) Either party to an absolute divorce is at liberty to contract a new marriage, and unless authorized by statute, the decree of divorce should not impose restraint upon this right and as to the custody of minor children. The great governing principle for the guidance of the court is the good of the child, and it may often be for the best interests of the child that is should be removed from the State. Barber v. Barber, 16 Cal. 378; Stetson v. Stetson, 80 Me. 483; Griffin v. Griffin, 18 Utah, 98.

STATEMENT.—This is an appeal from the judgment of the court denying defendant the right to introduce testimony on his motion to modify a decree of divorce entered against him in favor of plaintiff several years

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theretofore, with respect to the custody of the minor child of the parties.

We adopt from defendant's (appellant's) brief the following statement of facts which reveals the question in controversy and the ruling of the court thereon:

"On October 3, 1904, the plaintiff in this proceeding recovered a decree of divorce from defendant and was awarded alimony and the custody of their minor child Lucile, then aged six years; and on October 31, 1904, the decree was modified, allowing defendant to visit the child on Tuesday and Thursday evenings of each week and allowing him to take her out on Saturday and Sunday of each week.

"In February, 1911, the defendant filed his motion in said cause, under section 2381, R. S. 1909, to modify the said decree touching alimony and touching the custody of said minor, in which motion the defendant, after reciting the then state of the record, alleged that he has at all times since the decree paid to plaintiff the alimony as in the decree provided; that he has at all times recognized and respected her right to the custody of said child, as in the decree provided; also, that he has at all times since the decree taken advantage of the privilege granted to him of visiting the child on Tuesday and Thursday evenings and of visiting or taking her out on Saturday and Sunday of each week; that said child is now thirteen years of age, and the relations between her and her father, the defendant, have been most filial and affectionate; and that, besides paying the alimony to the mother, the defendant has also from time to time, when occasion made it proper to do so, provided the child with such necessaries and luxuries as his means permitted; that since the decree plaintiff has been residing with her mother and sister at 5450 Clemens avenue, St. Louis, Missouri, and the child has been residing with her, and that defendant

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has always been permitted to visit her at the said abode.

"It is also alleged that plaintiff contemplates becoming married in the near future to a man residing at Seattle, Washington; that her future husband is well able to provide for her support, and after the marriage she will no longer need alimony from the defendant to provide for her support; that plaintiff intends to remove said child to Seattle as her future home and to permanently take the child from St. Louis and beyond the jurisdiction of this court, and thus deprive the defendant of his right to visit and take out the child, as in the decree provided.

"It is also alleged that the best interests and welfare of the child demand that she be not taken away from the city of St. Louis and beyond the jurisdiction of this court and thus be deprived of the advantage of the superintending control of this court, in case her mother, through her conduct or through the conduct of her future husband, forfeits her right of custody of said child; that the welfare of said child also demands that she be not taken into the home of a stepfather; also that she be not taken away from the school where she is now being educated and from the companionship of her playmates and relatives, all of whom reside in the city of St. Louis; also that she be not taken away so that she will lose the companionship, advice and assistance of her father, the defendant, as assured to her under the decree.

"It is also alleged that defendant is in the employ of the Ferguson-McKinney Dry Goods Company, in St. Louis, and is in charge of their claim department; that he is earning $100 per month; that he resides at 5017 Delmar avenue, is of good moral character and enjoys good associates and good repute and standing; that he is well able to provide a proper and comfortable home for his said child, under proper superintendence, and to properly provide for her education

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and support and for her welfare; that he is able to have her make her home at his sister's house, where she will also have the benefit of the supervision and care of his sister, who is a widow and well qualified to look after the wants and needs of the child; or, if the court deems it more advantageous for the welfare of the child, defendant is willing to make any arrangement which the court may deem proper for the child to remain at the home of her maternal grandmother, with whom the child has resided and now resides; but if such an arrangement be insisted upon, it should be made under such safeguards as may be necessary to guarantee that the said child will not be taken away or permitted to go beyond the jurisdiction of this court.

"Defendant prayed the court to review, modify and change the decree touching alimony and touching the custody of said child, in the following respects: That the order touching alimony, under which defendant is now obligated to pay plaintiff the sum of thirty dollars per month, be so modified that it is to terminate upon and in the event of plaintiff's remarriage; that the order touching the custody of the child be so modified that in the future the defendant alone be awarded the care, custody and maintenance of the child, giving, however, to the plaintiff the right to visit the child at such times and under such conditions as the court may deem reasonable, the custody of the child to be awarded to the defendant under such conditions, if any, as the court may see fit to impose; and defendant also prayed for a restraining order, restraining plaintiff from taking the child out of the city of St. Louis or beyond the jurisdiction of the court, until otherwise ordered by the court, and that she be notified of the making of such restraining order and of the time when the hearing will be had by the court upon the motion, and that she be required to produce the child in court, upon the said hearing and to await the further orders of the court.

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"The court set the motion for hearing and issued a temporary restraining order, as prayed.

"On February 24, 1911, the parties appeared, and the motion came on for hearing. On an objection by plaintiff to the introduction of any evidence to be offered by defendant in support of the motion, the court took the motion and objection under advisement, and on March 2, 1912, entered an order sustaining the objection to the introduction of evidence, vacating the restraining order previously issued, and overruling the motion of February 17, 1911, to modify the decree, and in so far as said motion asks for a change of the care, custody and control of the child, the motion was denied. The court reserved jurisdiction over the cause and the parties, for the purpose of making such further orders with reference to the judgment for alimony as may hereafter be deemed meet and proper.

"In due time, defendant filed his motion for a new trial, defendant also offered to dismiss the specification as to alimony, and upon the court's refusal to permit the dismissal to be entered, defendant filed a motion, praying for leave to amend by dismissing the said specification. The latter motion, as well as the motion for a new trial, were overruled by the court, and defendant in due time perfected his appeal to this court.

"Defendant had also duly saved his exception to the orders of the court above complained of, and to the sustaining of the objection to the introduction of evidence, and to the order overruling defendant's motion for new trial.

"In view of the subsequent action of the court in vacating the order for alimony, when proof was subsequently submitted of the remarriage of the plaintiff, the defendant does not wish to raise, on this appeal, any question as to the propriety of the action of the court in refusing to vacate the order for alimony upon

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his original motion, nor to complain of the action of the court in refusing to permit defendant to dismiss the specification respecting alimony. Appellant assigns as error, first, the error of the court in entering the order of March 2, 1911, aforesaid, in sustaining plaintiff's objection to the admission of testimony offered by defendant in support of the motion; in vacating the restraining order which had theretofore been made; in overruling defendant's motion to modify the decree in so far as it related to the custody of the child, and in denying to the defendant the custody of the child, all of which matters were set out in the motion for a new trial; second, the error of the court in overruling defendant's motion for a new trial."

NORTONI, J. (after stating the facts).—The statute provides there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as in other cases. [Sec. 2381, R. S. 1909.] There can be no doubt that, under this statute, the court granting the divorce retains jurisdiction as to the modification of the judgment or decree touching the maintenance of the wife and the custody of the children. These matters may be brought to the attention of the court by motion in the original cause, as here, at a subsequent term, for the proceeding is but a continuation of the original jurisdiction concerning the custody of the children. [See Cole v. Cole, 89 Mo. App. 228; Meyers v. Meyers, 91 Mo. App. 151.] But though defendant filed a proper motion in the case, setting forth the facts upon which the modification of the decree concerning the custody of the child was sought, the court refused him the right to introduce testimony in support thereof and denied the application upon a mere *ore tenus* objection thereto, as if it appeared on the facts stated in the motion no prima facie right to the relief prayed appeared. It

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would seem the court treated the oral objection to the introduction of evidence in support of the motion as a demurrer thereto, and by the judgment given declared plaintiff had a right to remove the child out of the jurisdiction of the court into a foreign State and into a new home amid other surroundings, notwithstanding the decree establishing defendant's right to frequently visit his offspring and take her out on Saturdays and Sundays in St. Louis. Obviously this was error, for the decree of divorce established a right prima facie in defendant to visit the child and take her out in St. Louis, and this is true though it appears the divorce was granted for his fault. It is true that the motion for a modification of the decree sets forth no facts suggesting unfitness of plaintiff, the mother, as a proper person to retain custody of the little girl, but it does reveal that she was about to remove it from the jurisdiction of the court here and into a foreign State. Where the custody of children is awarded in divorce proceedings, as was done in the instant case, the child becomes the ward of the court, and the court thereby assumes a position of guardianship with respect to its person and future well-being. In this view, it is said to be against the policy of the law to permit the child to be removed into another jurisdiction and from within the province of the court first awarding the custody, unless the well-being and the future of the child would be better subserved thereby. [See Miner v. Miner, 11 Ill. 43, 51; Chase v. Chase, 70 Ill. App. 572; Campbell v. Campbell, 37 Wis. 206, 221, 222, 223; Jennings v. Jennings, 85 Mo. App. 290; Edwards v. Edwards, 84 Mo. App. 552.]

It appearing by the motion that the plaintiff, the mother, was about to remove the child from within the jurisdiction of the court, defendant was entitled to a hearing thereon and should have been permitted to show that the interests of the child would not be bettered by the removal.

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Although no one can doubt that the policy of the law forbids the removal of the child from within the jurisdiction of which it is a ward, the best interests and the future welfare of the ward should in every instance be weighed in the balance and determine the final order of the court touching its custody. While it is important to retain the child within the jurisdiction of the court, to the end of exercising its guardianship and power in making future orders for the custody, care and maintenance, it appears that the controlling thought influencing prior decisions on the subject makes for the welfare of the child, and a considerable discretion is allowed on this score. In other words, unless it appears the interests of the child would be best subserved by the removal, she should be retained here within the power of the court. [Jennings v. Jennings, 85 Mo. App. 290; Campbell v. Campbell, 37 Wis. 206, 221.]

The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

NOAH WARRINGTON, Respondent, v. J. H. BIRD, Appellant.

St. Louis Court of Appeals, December 3, 1912.

1. **INSTRUCTIONS: Assuming Existence of Disputed Facts.** It is not error for an instruction to assume the truth of a proposition which is established by the undisputed testimony and appears not to be controverted, but an instruction which assumes the truth of a proposition is erroneous if there is a conflict in the evidence respecting it and the issue as a vital one.

2. ———: ———: **Negligence: Action for Injuries: Assuming Ownership of Instrumentality.** In an action for injuries from an automobile, where the only issue was as to its ownership and control, and the evidence on that issue was conflicting, 168 Mo. App. 25

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an instruction, declaring the rule of care with respect to the operation of automobiles in public streets and directing that if "the defendant or his agent, in operating said automobile . . . at the intersection of said streets, on the day alleged in plaintiff's petition, operated the said car without observing the highest degree of care," and collided with plaintiff's horse and buggy, plaintiff could recover, was erroneous, for the reason it assumes that defendant or his agent was operating the automobile.

3. **MASTER AND SERVANT: Negligence: Action for Injuries Inflicted by Servant: Instructions.** In an action for injuries from an automobile, where the only issue was as to its ownership and control, and the evidence on that issue was conflicting, an instruction, that if "defendant or his agent, in operating said automobile, . . . on the day alleged in plaintiff's petition, operated said car without observing the highest degree of care," and collided with plaintiff's horse and buggy, plaintiff could recover, was erroneous, for the reason it permitted the jury to affix liability against defendant if they found that his agent was operating the machine at the time, without requiring a finding that the agent was operating it for him or in the course of his employment.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED AND REMANDED.

Bates H. McFarland and *Jeffries & Corum* for appellant.

(1) An instruction so worded that its language may reasonably be interpreted as assuming certain controverted facts to be true is erroneous. Fullerton v. Fordyce, 121 Mo. 13; Linn v. Bridge Co., 78 Mo. App. 111. (2) An instruction which directs a verdict on the whole case must contain all of the facts essential to the cause of action. Boegeli v. Marble Co., 49 Mo. App. 643; Carder v. Primm, 60 Mo. App. 423; Freeman v. Railway, 95 Mo. App. 103; Miller v. Tel. Co., 141 Mo. App. 462; Fleishman v. Ice Co., 148 Mo. App. 117; Collins v. Tootle Estate, 156 Mo. App. 221. (3) Where a presumption is one of fact the court can-

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not instruct that it is raised by law, but should instruct that it is for the jury to decide under the evidence whether they will raise the presumption. Hamm v. Barrett, 28 Mo. 388; Bluedorn v. Railway, 121 Mo. 27; Morton v. Heidorn, 135 Mo. 616; Sowders v. Railway, 127 Mo. App. 124; Linderman v. Carmin, 142 Mo. App. 528; Advertising Co. v. Publishing Co., 146 Mo. App. 103; Lawson on Presumptive Evidence, p. 659.

Crittenden Clark for respondent.

An instruction, correct as far as it goes, is not erroneous because it does not specifically require the jury to find that the negligent act of the servant, was within the scope of his authority. If the defendant considered that a defect in the instruction, it was his duty to supply it by asking an instruction on that subject. Wahl v. Transit Co., 203 Mo. 261.

NORTONI, J.—This is a suit for damages accrued to plaintiff through the alleged negligence of defendant. Plaintiff recovered and defendant prosecutes the appeal.

It appears plaintiff was driving in a buggy north on Garrison avenue in the city of St. Louis when an automobile, at the crossing on Locust street, collided with his horse and inflicted serious injuries thereto. The buggy was slightly injured as well. The driver of the automobile did not hesitate, but went on with increased speed, supposedly for the purpose of concealing the identity of himself and the ownership of the machine. There is no controversy in the case with respect to the negligence of the driver of the automobile. The evidence all tends to prove that the machine was being operated at about twenty-five miles per hour and no one contradicts it; whereas the speed ordinance prescribes a limit of ten miles per hour. Neither

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is there a serious question in the case, as it now appears, touching the negligence of the plaintiff. In fact, the only issue pertained to the ownership or control of the automobile and the person operating it at the time of the injury. The evidence tends to prove that defendant owned the automobile on and before the 15th day of April. Indeed, so much is admitted. However, the collision occurred on July 24 of the same year, and defendant insists that he had sold the automobile theretofore on April 15 and no longer owned or controlled it, and that he had no knowledge of the collision whatever. The only evidence introduced by plaintiff tending to prove the ownership of the automobile of defendant at the time of the injury is that it bore a license plate on the rear, numbered 2839, and the public records in evidence revealed that the license of this number was issued to defendant on the 14th day of April, or, as defendant says, one day before he sold the machine. The statute provides such license may not be transferred to another. Other than the fact that the number on the license plate was identical with that issued to defendant several months before, and the admitted fact that defendant owned the machine until April 15, there is naught in the record to suggest that either he or his chauffer was operating it at the time of the injury. From what has been said, it appears that the only issue in the case pertained to the ownership or control of the automobile and the identity of the person operating it.

For plaintiff, the court gave the following instruction, over defendant's objection and exception:

"It is the duty of persons owning and operating automobiles upon the public streets to use the highest degree of care possible to avoid injuring other persons found on such streets, and if you believe and find from the evidence in this case, that *the defendant or his agent, in operating said automobile in and upon the streets of Garrison and Locust, and at the intersection*

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of said streets, on the day alleged in plaintiff's petition, operated the said car without observing the highest degree of care, and that while so operating said automobile, the said automobile ran into and against plaintiff's horse and buggy and injured plaintiff's horse and buggy, and that the plaintiff at the time was exercising ordinary care, then you will find a verdict for the plaintiff." (Italics are ours.)

It is argued that this instruction is erroneous, in that, rather than submitting to the jury the question as to whether defendant or his agent was operating the automobile, it assumes such to be the fact, and proceeds accordingly. The words italicized in the instruction above copied are those complained of. Under prior controlling decisions, the argument seems to be sound and should control the disposition of the appeal. The instruction first declares the rule of high care which obtains under our statute with respect to the operation of automobiles and then tells the jury that if it believed from the evidence that the defendant or his agent, in operating said automobile, operated the same without observing high care, etc., plaintiff was entitled to recover, provided he was exercising ordinary care on his part. The words in italics as employed in the context of the instruction with respect to the subject-matter of high care seem to assume that defendant or his agent was operating the automobile at the time and suggest to the jury that such was the idea of the court. In view of the fact that the only issue in the case pertained to the ownership or control of the machine and the identity of the persons operating it, for upon this question the evidence was *pro* and *con,* this instruction is erroneous, in that it seems to remove that question from the province of the jury entirely. The court may, in its instructions to the jury, assume the truth of a proposition which is established by the undisputed testimony and appears not to be controverted, but it is manifestly improper

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to do so where there is a conflict in the evidence and the issue is a vital one in the case as here. [See Fullerton v. Fordyce, 121 Mo. 1, 13, 25 S. W. 587. See, also, Linn v. Massillon Bridge Co., 78 Mo. App. 111.] As the liability of defendant depended entirely upon the fact that he, or his agent for him, was operating the automobile at the time, this question should have been submitted in plain terms, and not tacitly assumed, as the instruction reveals.

This instruction is criticized, too, for the reason that it permits the jury to affix liability against defendant if they found that defendant's agent was operating the automobile at the time, without requiring a finding that the agent was operating it for him or in the course of his employment. Obviously, the criticism is a just one, for, though the automobile was being operated by defendant's agent, his liability does not depend upon the mere fact of agency alone, but depends as well upon the fact as to whether plaintiff's injury was received while defendant's agent was acting about the master's business or within the scope of his employment. Especially is this true in view of the evidence and the particular issue in this case, for defendant denied the ownership of the automobile and the control of it through himself or his servant, and, indeed, denied any knowledge of the collision whatever.

For the reasons above stated, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

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In re ELLROY V. SELLECK.

St. Louis Court of Appeals, December 3, 1912.

1. **APPELLATE PRACTICE: Finding by Commissioner of Appellate Court: Conclusiveness.** The appellate court will defer to the finding of facts of a special commissioner appointed by it, where the evidence is conflicting and the witnesses appeared and testified before the commissioner.

2. **ATTORNEYS: Disbarment: Misconduct of Attorney: Commissioners' Findings Approved.** In a proceeding to disbar an attorney, special commissioners appointed by the appellate court found from the evidence that respondent had entered into a conspiracy to effect a pretended sale of a stock of goods so as to defraud the creditors of the pretended vendor, that said fraudulent scheme was carried out, and that, in litigation arising out of it, respondent gave perjured testimony and suborned one of the conspirators to give perjured testmony; and further found that respondent, either by impersonating a deceased client, or otherwise, unlawfully obtained access to decedent's safety deposit box, and unlawfully took therefrom certain notes and deeds of trust belonging to decedent and converted them to his own use, with the intent of depriving the true owners of their property, and that respondent falsely pretended that decedent had entered into a written contract with him, whereby said notes and deed of trust were transferred to him, and falsely pretended that such contract was stolen from his desk, whereas in fact no such contract was ever executed. *Held*, that said findings are supported by the evidence; *held, further*, that, under said findings, the conclusion of law found by the commissioners, that respondent is not a fit or proper person to practice law in this State, is correct, and hence it is *held* that his license to practice law in this State should be revoked.

Original Proceeding to Disbar Attorney.

JUDGMENT OF DISBARMENT.

McDonald & Taylor, Thomas B. Harvey and *Walter H. Saunders* for informant.

John A. Talty and *Thomas J. Rowe* for respondent.

NORTONI, J.—This is an original proceeding for disbarment of the respondent, Ellroy V. Selleck, Esq.,

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instituted in this court at the instance of the St. Louis Bar Association, acting through its committee on grievances. Upon the respondent's appearing at the bar in person and by counsel, after notice and citation were duly served upon him, the court appointed Charles W. Bates, Esq., and George E. Smith, Esq., members of the St. Louis bar in good standing, as special commissioners to sit together, hear the testimony and make report of their findings of fact and conclusions of law thereon with respect to the several charges preferred. The commissioners were duly sworn and qualified to act in that behalf and in due time proceeded upon the discharge of the duties as such.

It appears that all parties interested appeared before the special commissioners in person and by counsel and introduced volumes of evidence, both oral and documentary. The special commissioners sat eighteen days hearing testimony, and there were examined before them in all eighty-five witnesses. The record accompanying their report to this court consists of four volumes containing in all 1843 pages, besides an additonal volume of documentary evidence alone in the form of exhibits introduced at the hearing. Together with this voluminous record, the special commissioners filed here the following report, setting forth their findings of fact and conclusions of law:

"State of Missouri, } ss.
City of St. Louis. }

IN THE
ST. LOUIS COURT OF APPEALS
MARCH TERM, 1912.

In the Matter of } No. 13209.
Ellroy V. Selleck }

SPECIAL COMMISSIONERS' REPORT.

"George E. Smith and Charles W. Bates, special commissioners appointed by this Honorable Court on

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November 20, 1911, to jointly take the testimony offered by the parties, relator and respondent, and to report the same, together with findings of fact and conclusions of law, as more fully appears by the copy of the order of appointment hereto attached and made a part hereof, after duly taking the oath of office on said day, which oath is hereto attached and made a part hereof, did by consent of parties, Messrs. Thomas B. Harvey and Walter H. Saunders appearing for relators, and Mr. John A. Talty appearing for respondent Selleck, after due notice and by consent of parties, begin the hearing of said cause on the 27th day of December, 1911, and continued to hear the same from time to time and from adjournment to adjournment as by consent of all parties until the 5th day of July, 1912, when both parties concluded the testimony desired to be heard by them respectively.

"That your commissioners held sixteen (16) sessions of entire days and two (2) sessions of half days and heard the testimony of eighty-five (85) witnesses.

"Your commissioners further report that they file herewith and make a part hereof transcript of the proceedings had before them, the testimony appearing in eighteen hundred and forty-three (1843) pages, and the written documents in evidence as exhibits appearing in a large separate volume.

"After hearing counsel, Messrs. Harvey and Saunders on behalf of relators, and Mr. Talty on behalf of respondent, your commissioners report as follows:

"The charges against respondent Ellroy V. Selleck are presented by the Bar Association of the city of St. Louis, seeking the disbarment of said Selleck. These charges are five in number, as appears from the charges filed in this court on the 30th day of September, 1911.

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"CHARGE FIRST.

"Your commissioners find the issues in favor of respondent, Ellroy V. Selleck, upon this charge.

"CHARGE SECOND.

"Your commissioners find the issues in favor of respondent, Ellroy V. Selleck, upon this charge.

"CHARGE THIRD.

"Your commissioners find the issues in favor of respondent, Ellroy V. Selleck, on this charge.

"CHARGE FOURTH.

"Your commissioners find the issues against Ellroy V. Selleck on this charge and find him guilty as charged.

"Further, upon this charge your commissioners find that said Ellroy V. Selleck was in the year 1906 duly admitted to practice law and licensed to practice law in the courts of the State of Missouri, by the Supreme Court of Missouri, and from that time continuously up to the present time he has been engaged in the practice of law as an attorney and counsellor. That in the months of November and December, 1908, one Charles Mathew Kotzaurek was conducting two hat stores in the city of St. Louis, one at 603 Pine street and one at 907 Pine street, and that the said Kotzaurek was indebted to various persons for rent of the said stores and for hats purchased and contracted for; that in his employ at that time was one Bertha Henkel; that at that time and prior thereto the said Ellroy V. Selleck was and had been the attorney and counsel for said Bertha Henkel; that sometime in the month of November or December, 1908, said Bertha Henkel introduced the said Kotzaurek to her attorney, the said Ellroy V. Selleck; that under the advice and direction

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of said Selleck, he conspiring with the said Kotzaurek and the said Henkel, a scheme was devised by said Selleck for this purpose, and said Kotzaurek and said Henkel directed by the said Selleck in his capacity as their counsellor and attorney, to execute falsely bills of sale and promissory notes and to authorize the said Selleck to execute certain checks to apparently consummate a sale of the stock of hats by said Kotzaurek to said Henkel; that said papers were executed and delivered, although in truth and in fact no such transaction took place as purported to be set forth by said papers; that litigation ensued, involving those transactions, and as a part of the conspiracy and plan devised by said Selleck to carry out said fraudulent scheme, he, the said Selleck, directed and instructed the said Henkel to give false and perjured testimony, in pursuance of which plan and scheme said Henkel did knowingly, wilfully and intentionally, in the trial of said litigation, give false and perjured testimony under the direction and at the suggestion of said Selleck, and the said Selleck, in said litigation, did knowingly, wilfully and intentionally give false and perjured testimony.

"CHARGE FIFTH.

"Your commissioners find against the respondent, Ellroy V. Selleck, on this charge and find that the allegations in said charge are true.

"Further, your commissioners find that said Selleck, being a licensed attorney as heretofore stated and practicing his profession in the city of St. Louis, was for some months prior to July 20, 1910, employed by one John Link as attorney and legal adviser; that said John Link died on the 20th day of July, 1910, and that letters testamentary were issued by the Probate Court of the city of St. Louis to his widow, Minna Link, on July 23, 1910. That during his lifetime the

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said John Link was the owner, among other things, of the following notes, secured by deeds of trust, to-wit: One principal promissory note, dated April 1, 1906, executed by one John Schmittel, for the sum of $3500, which note, prior to the times hereinafter referred to, had been reduced by payments to $2750; said note was payable to B. C. Stephens of Clayton, Missouri, three years after its date and by him indorsed without recourse. Said note had been purchased by said John Link and time had been extended on said note and new interest notes for $150 each, given therefor. Said notes were secured by deed of trust on Lot No. 2 of Human Place, being a subdivision of the west half of the west half of the northwest quarter of section eight (8), township forty-five (45) north, range six (6) east, in St. Louis county, Missouri. Also a principal promissory note for $4500, executed by one Ellen A. Manion, dated April 1, 1910, payable three years after date, to August J. Kuhs, Jr., and by him indorsed; also six (6) interest notes accompanying the same, each for the sum of $123.75, all secured by deed of trust on Lot Eighty-two (82) of Tower Grove Heights Amended Subdivision in Block 4114 of the city of St. Louis, Missouri; that after the death of John Link, said Ellroy V. Selleck was employed by Mrs. Minna Link as her attorney to represent her and the estate of John Link, upon which she was administering; that shortly after the death of John Link and before letters testamentary were issued on John Link's estate, the said Ellroy v. Selleck, either by impersonating John Link or otherwise, unlawfully obtained access to the safety deposit box of the said John Link in the Mercantile Trust Company, where the said Link kept his papers, among others the said notes and deeds of trust; that the said Ellroy v. Selleck obtained possession of said notes and deeds of trust and unlawfully, wilfully and knowingly, with the intention of depriving the true owners thereof of their property, converted the same to his own use;

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that he has refused to account for same or their value to the said estate of John Link, deceased, or to the executrix of said estate or to the attorneys employed by the executrix after she discharged from employment the said Selleck; that the said Selleck falsely pretended that John Link in his lifetime had entered into a written contract with him as attorney for said John Link and one McGregor, whereby the said Schmittel notes and deed of trust were transferred to said Selleck, and falsely pretended that said contract was stolen from his (the said Selleck's) desk, whereas your commissioners find the fact to be that no such contract was ever executed, nor was any such contract ever stolen from said Selleck's desk or otherwise.

"Your commissioners find as a matter of law, upon the facts so found as above, that said Ellroy V. Selleck is not a fit or proper person to practice law in the State of Missouri and that his license so to practice should be revoked.

"Respectfully submitted,
CHARLES W. BATES,
GEORGE E. SMITH,
Special Commissioners."

From the report of the special commissioners above copied, it appears that the finding was for respondent on the first, second and third charges laid against him, but against him on the fourth and fifth charges therein set forth and described. To this report the respondent filed exceptions, and those exceptions have been extensively argued by counsel at the bar and the case duly submitted for determination. The two sitting members of the court have devoted more than a week's time to reading and comparing the mass of testimony and numerous documents contained in the record, and considering the arguments in support of the respondent's exceptions. Having given

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the case most thoughtful and careful consideration, upon reviewing all of the evidence, we incline to the view expressed in the special commissioners' report above set forth. It is true that there is considerable testimony in the record tending to prove the inocence of defendant on both of the charges which the special commissioners found against him, but upon comparing this testimony with that of other witnesses and irrefutable dates and documents introduced and the revelations made in some of the cross-examinations, we are fully persuaded that the special commissioners ascertained the truth with respect to the whole matter. Furthermore, when the evidence is conflicting, as it is here, it is proper for the court to defer to the finding of the special commissioners who have the witnesses before them face to face and are thus afforded an opportunity through observing their demeanor on the stand to form a more accurate conclusion touching the matter of credibility and as to what testimony is and what is not true than is the reviewing court which sees only the cold record in print. [See State of Missouri ex rel. Gay v. Jones, 158 Mo. App. 170, 138 S. W. 81.]

The evidence abundantly supports the findings of fact above set forth in the report of the special commissioners, and if the facts are properly found, as they appear to be, no one can doubt the soundness of the conclusions of law announced by the special commissioners thereon in their report. In this view, the respondent's exceptions filed to the report should be overruled and the report of the special commissioners adopted *in toto*. It is so ordered.

It is, therefore, the judgment of the court that the respondent, Ellroy V. Selleck, Esq., who, as appears from the records of this court, is an enrolled member of its bar, be and he is hereby debarred from the further practice of the profession of an attorney and counselor at law under the laws of this State in any of

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the courts thereof and especially from the bar of this court; that his license to practice law and as a member of the bar of this State be and the same is hereby cancelled and annulled and to be henceforth held as naught. Furthermore, that the relators have and recover the cost of this proceeding, to be taxed by the clerk according to law, of and from the respondent, Ellroy V. Selleck, and that execution issue. It is so ordered and adjudged. *Caulfield, J.*, concurs. *Reynolds, P. J.*, not sitting.

M. SILBERBERG, Respondent, v. ISRAEL GITENSTEIN, Appellant.

St. Louis Court of Appeals, December 3, 1912.

1. **APPELLATE PRACTICE: Review: Motion to Affirm Justice's Judgment: Necessity of Saving Exception.** The ruling of a circuit court sustaining a motion to affirm a judgment of a justice of the peace for failure of the appellant to give notice of the appeal cannot be reviewed by the appellate court, unless the motion and an exception to the ruling thereon are preserved in the bill of exceptions.

2. **———: ———: ———: Necessity of Motion for New Trial.** The ruling of a circuit court sustaining a motion to affirm a judgment of a justice of the peace for failure of the appellant to give notice of the appeal cannot be reviewed by the appellate court, unless such ruling was brought to the attention of the trial court by a motion for a new trial or rehearing.

3. **———: ———: Matters of Exception: Necessity of Motion for New Trial.** Matters of exception are not open to review, on appeal, unless the bill of exception preserves the motion for a new trial, calling the attention of the trial court to such exceptions, and also preserves an exception to the denial of such motion.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

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AFFIRMED.

Felix Cornitius for appellant.

Henry H. Furth for respondent.

NORTONI, J.—This cause originated before a justice of the peace, and defendant prosecuted an appeal from the judgment there rendered against him, to the circuit court. Two terms of court having elapsed after appeal was perfected, plaintiff moved an affirmance of the judgment of the justice for want of notice of the appeal, as it is said no such notice was given. On a hearing, the court sustained this motion and gave judgment for the plaintiff affirming the judgment of the justice. It is from this judgment of the circuit court, on plaintiff's motion for an affirmance because of the failure to give notice of the appeal from the justice, that the present appeal is prosecuted.

The record here is in such condition as precludes our right of review. Though a bill of exceptions was made and filed in due time and appears to have been allowed and signed by the judge, there is no exception whatever to be found therein. The question which it is sought to have reviewed here arises wholly on the motion to affirm the judgment of the justice, and there appears to have been no exception saved to the ruling of the court on that motion. Mere motions filed in a cause are not part of the record proper but are matters of exception which themselves, together with an exception to the ruling of the court thereon, must be preserved in the bill of exceptions in order to have the ruling on such motions reviewed on appeal. [See Stark v. Zehnder, 204 Mo. 442, 102 S. W. 992.] It is true the motion itself is incorporated in the bill of exceptions here. However this may be, no exception to the action of the court thereon appears.

Furthermore, we are precluded from reviewing the ruling of the trial court on this motion and in af-

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firming the judgment of the justice, for the reason that no motion for a rehearing or new trial of that question appears in the bill of exceptions. Matters of exception which occur in the trial court must be brought to the attention of the trial court by a motion for a new trial or rehearing and that tribunal afforded an opporunity to review the ruling thereon or else no review of the same question may be had here. It may be that, had this question been presented to the trial court by a motion for a new trial or rehearing, this appeal would have been unnecessary, for, perchance, the trial court would have corrected the ruling complained of, if it is, in fact, an erroneous one. At any rate, it is well settled that rulings on motions interposed before final judgment and exceptions thereon will not be reviewed in the appellate court in the absence of a motion for a new trial or rehearing first inviting the attention of the trial court thereto. When there is no motion for a new trial in the bill of exceptions, the matter of exception is not open for review on appeal. [See Coy v. Landers, 146 Mo. App. 413, 125 S. W. 789; Simcoe Realty Co. v. Wm. J. Lemp Brewing Co. et al., 247 Mo. 29, — S. W. ——.] Moreover, even where there is a motion for a new trial or rehearing and such motion has been overruled, matters of exception will not be reviewed here unless there appears, too, an exception to the action of the trial court in overruling the motion for a new trial. [See Wilbrandt v. Laclede Gas Light Co., 135 Mo. App. 220, 115 S. W. 497.]

For the reasons given, the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

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STATE ex rel. LEWIS B. TEBBETTS, Appellant, v. CHARLES W. HOLTCAMP, Judge, et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted November 15, 1912. Opinion Filed December 3, 1912.

GUARDIAN AND WARD: Testamentary Guardian: Failure to Give Bond: Failure to Give Statutory Notice: Jurisdiction to Appoint Statutory Guardian: Probate Courts. In view of the provisions of Sec. 424, R. S. 1909, fixing the amount of a curator's bond at double the value of the estate, the giving or tendering of a bond by a testamentary guardian of the person of an infant is not a condition precedent to his right to assume such guardianship, where the infant has no estate; but his notification of the probate court of his acceptance of the guardianship, within six months after the probate of the will, as provided by Sec. 409, R. S. 1909, is a condition precedent, and the failure to give such notice clothes the probate court with jurisdiction to appoint a statutory guardian, as authorized by the statute, and the fact that the testamentary guardian qualified as executor of the will and assumed the duties of guardian for some years would not dispense with the necessity of giving notice nor deprive the probate court of jurisdiction to appoint a statutory guardian.

Appeal from St. Louis City Court.—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

J. D. Johnson and *Loomis C. Johnson* for appellant.

(1) (a) The provisions of the statutes, insofar as they relate to the time in which bond shall be given by testamentary guardians, are directory merely and not mandatory. Secs. 408, 409, R. S. 1909; State ex rel. v. Lafayette Co. Ct., 41 Mo. 554; State ex rel. v. Churchill, 41 Mo. 43; State ex rel. v. Howard Co. Ct., 41 Mo. 252; State ex rel. v. Texas Co. Ct., 44 Mo. 230. (b) If the statute (sec. 409) is to be construed to

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provide that the testamentary guardian shall notify the probate court of his acceptance of the testamentary guardianship within six months, then the same principle applies, and such provision is directory merely. Sec. 409, R. S. 1909. (2) (a) If the reason for a law fails, the law itself does not apply (*cessante ratio, cessat ipsa lex*). Russell v. Russell, 122 Mo. 238; Schultz v. Sutter, 3 Mo. App. 141; Costigan v. Tr. Co., 38 Mo. App. 225; Boyle v. Railroad, 21 Mo. App. 425; Smelting Co. v. Stevenson, 4 L. R. A. 62. (b) The requirement as to the giving of bond by the testamentary guardian is for the purpose of protecting the estate of the ward, coming in the hands of the guardian. Sec. 424, R. S. 1909; State ex rel. v. Tittman, 134 Mo. 162; State ex rel. v. Bolte, 72 Mo. 272; State ex rel. v. Weaver, 92 Mo. 673. Hence if, as here, the guardian is possessed of no property belonging to the ward then there can be no property interest to be protected by a bond, and the reason for the application of the statute being absent the statute does not apply. Cases cited under point 1(a). (c) The statutes provide that the guardian shall give bond in twice the amount of the ward's estate coming into his hands. Secs. 408 and 424, R. S. 1909. Applying these statutes to the case presented at bar, Tebbetts, the testamentary guardian, could have been required to give bond only for twice the amount of nothing or nothing—an absurdity. Neither the courts nor the law require the doing of an absurd, a needless or useless act. Lumber Co. v. Knight, 157 Mo. 379.

Frank X. Hiemenz for respondents.

(1) Probate courts have exclusive jurisdiction over the appointment of guardians of minors; our Constitution does not establish, but provides for, probate courts in each county and fixes a jurisdiction which cannot be taken away by the Legislature, hence

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probate courts possess general jurisdiction over particular subjects. Constitution, sec. 34, art. 6. (2) Every testamentary guardian must qualify under the statutes; failing so to do, the probate court may appoint another. Secs. 408 and 409, R. S. 1909; Woerner on Guardianship, 58; Davidson v. Koehler, 76 Ind. 417; Wadsworth v. Connell, 104 Ill. 375. (3) The right to a testamentary guardian must be claimed within six months from the probate of the will or it is lost. Woerner on Guardianship, 58. (4) All guardians must give bond before entering upon the duties of their office and guardians of the estate must give bond in double the amount the value of the estate. Sec. 424, R. S. 1909.

REYNOLDS, P. J.—This case comes to us on appeal from the action of the circuit court of the city of St. Louis in refusing, on a writ of *certiorari* issued out of that court and directed to the probate court of the city of St. Louis, to disturb the action of the latter court in connection with the appointment of one Rebecca Rickart, as guardian of the persons of minor children of one Ellen M. Breck, deceased. At the conclusion of the hearing of the cause before the honorable circuit court and in support of his finding and judgment affirming the judgment of the probate court, the learned circuit judge handed down a memorandum in writing, setting out his view of the facts and the law.

A motion for new trial having been filed and argued, it was overruled. In overruling it the court handed down a further memorandum setting out the grounds of his action and his reasons for overruling the motion. As these memoranda place the matters in issue very concisely, and as, on consideration of the cause, we have arrived at the same conclusion as that of the learned circuit judge, we can do no better than

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reproduce here the memoranda above referred to, prefacing them with this statement:

It appears that the relator Tebbetts, having heard, in September, 1911, that Mrs. Rickart intended to apply to the probate court for letters of guardianship of the persons of the minor children, on September 6, 1911, made application to that court for letters, tendering bond. On that day, and about thirty minutes after filing of this application, Mrs. Rickart presented her application for like appointment. In his application for letters of guardianship presented to the probate court, the relator represents that he is a resident of the city of St. Louis and the grandfather of the three children named, giving their ages; that they reside in the city of St. Louis; that they own no property and that under the terms of the will of Mrs. Breck, which had been duly probated, he was nominated and appointed guardian of the minors, "wherefore he prays that he may be appointed guardian of the persons of said minor in accordance with said last will of Ellen M. Breck, mother of said minors, not having been adjudged unfit for the duties of guardianship of said minors, the other lawful parent of said minors being dead at the time, and the applicant hereby notifies the probate court or judge thereof in vacation of his acceptance of the guardianship." This is sworn to by the relator. In his petition for the writ of *certiorari*, the relator sets out that he had filed this application in the probate court in consequence of having learned that Mrs. Rebecca Rickart and her husband intended filing an application there for the appointment of Mrs. Rickart as such guardian, and that while he contended that under the provisions of the will and in view of the fact that he had on the death of their mother and ever since then had charge of the minors, he thought it was unnecessary for him to make the application, yet that he had made it out of abundant

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caution and in view of the action of Mrs. Rickart and her husband.

The probate judge declined to appoint the relator as such guardian and to the contrary appointed Mrs. Rickart. It is on this record of the action in the probate court that the writ of *certiorari* was sued out. Other facts necessary to an understanding of the case appearing in the memoranda of the circuit judge above referred to, render it unnecessary to make any fuller statement of them.

The memorandum handed down along with the finding and judgment affirming the judgment of the probate court is as follows:

"The only question for decision in this case is: Did the probate court of the city of St. Louis, on September 6, 1911, have power or jurisdiction to appoint a statutory guardian of the persons of Louis Tebbetts Breck, Letitia Breck and Barbara Breck, minors? Or, to put the proposition in another way, was that court on that day bound to recognize the appointment of the relator as testamentary guardian of said minors under the will of their mother, Ella M. Breck, and to permit him to qualify as such guardian?

"We are not concerned in this case with the appointment of Lloyd H. Rickart as curator of the estates of said minors nor, assuming that the probate probate court had power to appoint a statutory guardian of the persons of said minors, are we concerned with the propriety of the action of that court in appointing Rebecca Rickart as such guardian.

"Under section 34, article 6, of the Constitution, and article 4, chapter 35, R. S. 1909, probate courts are given exclusive jurisdiction over the appointment of statutory guardians of the person and curators of the estates of minors.

"Section 408, R. S. 1909, provides that the lawful parent of any minor not having been adjudged unfit for the duties of guardianship, may, when the other

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lawful parent is dead, and only in such cases, by will, appoint a guardian of the person of such minor, who, if he accept shall give bond and security, and be in all things upon the same footing as guardians appointed by the court or chosen by the minor, except that the minor shall not be allowed to choose any other guardian upon arriving at the age of fourteen years, unless the testamentary guardian decline to serve longer, and notify the court thereof, or his appointment be revoked.

"Section 409 provides:

"'If any testamentary guardian shall fail to notify the probate court, or the judge thereof in vacation, of his acceptance of the guardianship, and give bond and security within six months after the probate of the will, the court, or judge in vacation, may appoint a guardian, as if no appointment had been made by the testator.'

"On December 15, 1905, Ella M. Breck, the mother of the above minors, died, leaving a will. At that time, the father of said minors was also dead.

"The testatrix was, at the time of her death, a resident of the city of St. Louis, Missouri, and prior thereto had the care and custody of said minors.

"On the 16th day of January, 1906, her will was duly probated in the probate court of the city of St. Louis, Missouri.

"The relator and one Arthur P. DeCamp were named as executors in the will; they were also made trustees of the estate of the testatrix, with power, as such trustees, to use the income, and if necessary, a part of the *corpus*, for the support, education and maintenance of said minors.

"By the second clause of said will the testatrix provides as follows:

"'I nominate and appoint my father, L. B. Tebbetts, guardian of my said children, and hereby confer upon him all of the rights, powers and authority which

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a testamentary guardian is entitled to exercise under the laws of the State of Missouri. Should he fail to qualify and act as such guardian, or should he, for any cause, cease to act as such guardian after qualifying as such, I nominate and appoint my brother-in-law, Arthur P. DeCamp, guardian of my said children.'

"This guardianship was clearly that of the person and not of the estate.

"On the same day that said will was admitted to probate, the executors therein named were, upon their petition, granted letters testamentary upon the estate of the testatrix without bond and proceeded to administer thereon, and presented their final settlement on December 6, 1910, and were discharged as such executors on the 14th day of December, 1910.

"It appears from the record certified from the probate court that the relator assumed the duties of guardian of the persons of said minors immediately after the death of their mother, in December, 1905, and was still acting as such guardian on September 6, 1911; but at no time between those dates did he notify the probate court or the judge thereof of his acceptance of such guardianship unless his qualification as executor of the estate can be regarded as such notice, nor did he at any time between those dates give or offer to give a bond and security.

"During the period between those two deaths, the relator and his coexecutor, acting as trustees under said will, appropriated and used out of the estate of the testatrix something over $6600 for the support, education and maintenance of said minors.

"The controlling question in this case is: When, if ever, did the power or jurisdiction of the probate court attach, so as to warrant it in appointing a statutory guardian of the persons of said minors?

"We must rely upon clause 3 of the will quoted above and sections 408 and 409, Revised Statutes 1909, for the solution of this question.

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"It is entirely clear from reading clause 2 of the will that the testatrix had in mind the provisions of the statute relating to the appointment and qualification of a testamentary guardian.

"Sections 408 and 409 relate solely to the appointment of testamentary guardians of the persons of minors, and to their acceptance and qualification. They are required by section 409 to notify the probate court or the judge thereof of their acceptance, and to give bond and security within six months after the probate of the will, otherwise, the court or judge in vacation may appoint a statutory guardian, as if no appointment had been made by will.

"It is claimed that qualification as executor under the will was a substantial compliance with the requirement to give notice, and that the performance of the duties of guardian was in fact an acceptance of the guardianship and it is argued that giving the bond and security was not required, because, as guardian only of the person, the relator could not come into possession of the estates.

"In considering when the power or jurisdiction of the probate court to appoint a statutory guardian attached, the court cannot lend its assent to this proposition. It is the settled law of this State that within six months following the probate of a will, the probate court has not power to appoint a statutory guardian, unless the testamentary guardian has first refused to act, or, if acting, had been removed for cause.

"By the express terms of the statute, however, if the testamentary guardian fails to give notice, and fails to give bond and security within six months, then the probate court or the judge thereof may act; in other words, its jurisdiction attaches.

"The relator did not formally notify the probate court of his acceptance, nor did he offer to give bond and security as provided by the statute for more than five years after the probate of the will. He now claims

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that his act of qualifying as executor on the date of the probate of the will and his assumption of the duties of guardian during all this period held the jurisdiction of the probate court in abeyance.

"To sustain this contention would mean to determine a question of jurisdiction not by a definite and fixed rule of law, but by the act of the relator.

"Both under the provisions of the will and the statute, the testamentary appointment of the relator as guardian was intended to and did cease upon his failure to comply with the express terms of the statute within six months after the probate of the will, and jurisdiction to appoint the statutory guardian then attached.

"The cases cited in the relator's brief holding that the statutory provision requiring certain elective officers to give bond within a fixed number of days after their election is directory only and that a bond given or tendered after the time fixed by statute is sufficient, do not seem to be controlling in this case. Those cases hold that the giving of an official bond is not a condition precedent to title to an office. But they do not hold that the giving of an official bond is not a condition precedent to assuming and performing the duties of the office.

"It has been held that the title of a testamentary guardian of the person, to his office, relates back to the time of the probate of the will, and I apprehend he may possibly assume the duties of such a guardian immediately upon the probate of the will; but he certainly cannot continue the performance of these duties for a longer period than six months, without qualifying in the manner provided by statute."

The memorandum handed down in connection with the action of the circuit court in overruling the motion for new trial is as follows:

"The court must again remind counsel that the only question for decision in this proceeding is, did

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the probate court have power or jurisdiction to appoint any other person than the relator, guardian of the persons of the Breck children, on September 6, 1911? If such power was then lodged in the probate court, this court cannot, in this proceeding, either review or annul the action of the probate court, however much it might regard that action as being unwise, in view of all the facts then before it, nor is there any other question which arises upon the record now before this court the subject of review. I refer to the action of the probate court in appointing a curator of the property and estates of said minors. If it was the purpose of the probate court to have the curator appointed by it, or is the purpose of such curator, to take over the property and estate of said minors now vested in Tebbetts and DeCamp, as trustees, under the will of Ellen M. Breck, then a question will arise which is not now before this court, and which ought not, therefore, to be discussed.

"Counsel for relator in their brief supporting the motion for rehearing and in arrest of judgment quote an excerpt from a former memorandum filed in this case, which excerpt reads as follows:

" 'Those cases hold that the giving of an official bond is not a condition precedent to title to an office. But they do not hold that the giving of an official bond is not a condition precedent to assuming and performing the duties of the office.'

"It is then shown that this statement is not in accord with the law as laid down by the Supreme Court of the United States in United States v. Bradley, 10 Peters 343; United States v. Flanders, 112 U. S. 88; United States v. Linn, 40 U. S. 290, l. c. 313; also the case of United States v. Eaton, 169 U. S. 331.

"It is also argued that the Missouri cases cited which are reported in 41 Mo., State ex rel. Adamson v. Lafayette Co. Ct., 545, l. c. 554; State ex rel. Att'y Gen'l v. Churchill, 41, l. c. 43; State ex rel. Jackson

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v. Howard Co. Ct., 247, l. c. 252, adopt a like rule. It is sufficient to say, first, that no such question was before the Supreme Court of this State in the cases reported in 41 Mo.; and, second, that they do not expressly so hold. The language used by this court which is quoted in the relator's brief rests upon the authority of the statute. Section 424, Revised Statutes 1909, provides that 'all guardians and curators appointed by the court, or judge in vacation, or chosen by the minors under the sanction of the court, or judge in vacation, shall,' among other things, 'before entering on the duties of their office, give bond, with two or more sureties, . . . to be approved by the court or judge in vacation.' Section 408, which relates to the appointment of testamentary guardians of the persons of minors says, among other things, such guardian, 'if he accept, shall give bond and security, and be in all things upon the same footing as guardians appointed by the court or chosen by the minor, except that the minor shall not be allowed to choose another guardian upon arriving at the age of fourteen years.'

"The policy of the law of this State in respect to such matters is further illustrated by section 20, which provides that where one or more persons are appointed co-executors none shall have authority to act as such, or intermeddle, except those who give bond, unless, of course, the executors named in the will are permitted by the terms thereof to act without bond.

"Turning to chapter 109, relating to sheriffs and their deputies, we find that section 11,202 requires every sheriff within fifteen days after he receives the certificate of his election or appointment, to give bond to the State. Section 11,206 provides that every sheriff shall, before entering upon the duties of his office cause his certificate of election or appointment with the oath of office indorsed thereon, and his official bond with the approval indorsed thereon, to be re-

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corded at his own expense in the office of the recorder of the county. Section 11,206 quoted above is identical with section 7, chapter 25 of the Revised Statutes of 1865, and was in force when the cases reported and quoted in 41 Mo. were decided.

"In view of the statute of 1865 referred to above, it is clear that the Supreme Court did not and could not have decided that the giving of an official bond of the sheriff was not a condition precedent to entering upon the duties of his office. The right of a testamentary guardian to assume control of a minor entrusted to his care is somewhat analogous to the preferential right of the next of kin to administer upon the estate of the ancestor, as provided by section 15 of the statute. If the persons referred to in section 15 fail to qualify within thirty days, section 16 provides that a citation may be issued requiring them to appear and qualify, and if, after being cited, they fail to administer, then the court may appoint some one who has no preferential right. The preferential right given to the next of kin to administer is derived from the law and not from appointment by the court, just as the prefenential right of a testamentary guardian is derived from the will, and not from appointment by the court.

"In the latter case, however, the law does not require a citation to be issued to a testamentary guardian who has failed to qualify within six months, before the court is warranted in appointing another in his stead.

"As stated in the former memorandum, the relator had before him the will under which he assumed to act, which by its very terms conferred upon him all of the right, power and authority which a testamentary guardian is entitled to exercise under the laws of the State of Missouri, and which further provided that in case he should fail to qualify and act as such guardian, then another should act in his stead.

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Neither the relator nor his alternate, Mr. DeCamp, ever undertook to qualify under the statute, either within six months, or within more than five years after the probating of the will."

We believe that the learned trial judge, in this last memorandum has noticed most of the cases urged upon us by counsel, so that it is unnecessary for us to go into them any more fully than is here done.

We concur in the conclusion arrived at by the learned circuit judge and in most of the reasoning by which he has reached that conclusion. We are not to be held, however, as deciding that it is necessary, or jurisdictional, in all cases, that a bond should be given or tendered. The statute (R. S. 1909, sec. 424) in requiring a bond from a guardian, fixes its amount at "double the value of such estate." If there is no estate, there is no necessity for tendering or giving bond. But under section 409 he must notify the probate court of his acceptance of the guardianship within six months.

The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

IRENE KORACH by Next Friend, Appellant, v. ANNA M. LOEFFEL, Respondent.

St. Louis Court of Appeals. Submitted on Briefs November 11, 1912. Opinion Filed December 3, 1912.

1. **PLEADING: Pleading Over: Effect on Abandoned Pleading.** Where, after a demurrer to a petition is sustained, plaintiff files an amended petition, the original petition disappears from the case.

2. **LANDLORD AND TENANT: Injury Sustained on Demised Property: No Covenant to Repair: Liability of Landlord.** There is no implied warranty, in a contract of letting, that the premises are tenantable or suitable for the purposes for

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which they are let, or, in the case of a dwelling house, that it is either safe or convenient; and where the landlord is not guilty of creating a nuisance or of wilful wrong or fraud or culpable negligence, he is not liable for any injury suffered by any person occupying or coming upon the premises during the term of the lease.

3. ———: ———: ———: **Pleading: Conclusions.** In an action against a landlord for injuries to the tenant's minor child from the falling of a metal plate over a grate in the demised premises, an averment in the petition, that "it was the duty of the defendant, by the terms and conditions of the verbal lease aforesaid, to have said premises in a safe and proper condition for the use and occupancy of plaintiff, so that plaintiff could occupy said premises with safety," was a statement of the pleader's conclusion, and was not an averment that there was a covenant to repair.

4. ———: ———: ———: **Liability of Landlord.** While a landlord who demises premises to different tenants, with part in common for the use of all, is bound to exercise ordinary care to keep such common part in a reasonably safe condition, he is not, in the absence of a covenant so to do, bound to exercise ordinary care to maintain or keep in repair premises demised as a dwelling, where the tenant is in possession of the whole premises; and hence where a tenant of a dwelling house was in possession of the whole premises, and the landlord had not covenanted to make repairs, a minor child of the tenant, who was injured by the falling of a metal plate over a grate, could not recover against the landlord.

5. ———: **No Covenant to Repair: Right of Landlord to Make Repairs.** Where a single dwelling is demised to one person and he is given possession of the whole premises and the landlord has not covenanted to make repairs, no one, not even the landlord, can enter, without his permission, to make repairs.

6. ———: **Injury Sustained on Demised Property: Breach of Covenant to Repair: Liability of Landlord: Remote Damages.** The breach by a landlord of a covenant to make repairs to demised premises will not support an action for personal injuries due to the failure to make such repairs, because such injuries are deemed too remote to have been contemplated by the parties when the covenant was given.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

AFFIRMED.

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C. Porter Johnson and *Malcolm D. Owen* for appellant.

(1) Where the landlord expressly agreed with a tenant at the time of renting the premises that he would make certain repairs, he is liable for injuries to a child of the tenant caused by his failure to make such repairs. Collins v. Fillingham, 129 Mo. App. 340. (2) It is the duty of the landlord when he leases the property to disclose to the tenant the true condition of the same and to make known to the tenant such defects as he knows to exist, or which he could know by reasonable diligence, and if he fails to do so he is liable to the tenant for injuries sustained. Coke v. Gutkese, 80 Ky. 598; Cesar v. Karutz, 60 N. Y. 229; French v. Vining, 102 Mass. 132; Godle v. Hagerty, 20 Pa. 387; Carson v. Goldey, 26 Pa. 111. (3) It is not necessary to show that the landlord had actual knowledge of the defects complained of. His duty was due care and ignorance was no defense, and if the use actually made of the premises was something which the defendant was bound to have contemplated, he was liable for any neglect for proper precautions to make it safe. Rose v. Bank, 43 N. E. 92; Lindsey v. Leighton, 22 N. E. 902; Leydecker v. B., 33 N. E. 399.

Julius T. Muench and *H. F. Hecker* for respondent.

(1) Plaintiff, by pleading over after demurrers to the petitions had been sustained, abandoned the prior pleadings and, on appeal from the judgment of the court sustaining defendant's demurrer to the third amended petition, only allegations contained in such petition may be considered. Owens etc. Co. v. Pierce, 5 Mo. App. 575; Young v. Woolfolk, 33 Mo. 110; Bobb v. Bobb, 89 Mo. 418; Rand v. Grubbs, 26 Mo. App. 595. (2) The lessor of premises is under no implied

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obligation to make repairs upon premises leased and can only be held liable in damages for his failure to make repairs, under an express agreement or a covenant contained in the contract of letting. Ward v. Fagin, 101 Mo. 669; Little v. McAdaris, 29 Mo. App. 332; Roberts v. Cottey, 100 Mo. App. 500; Grant v. Tomlinson, 138 Mo. App. 222; Finer v. Nicholls, 158 Mo. App. 539; Glenn v. Hill, 210 Mo. 296. (3) The maxim of *caveat emptor* governs the condition of premises, and the landlord is under no obligation to deliver the premises to the tenant free from defects or to discover defects and disclose them to the prospective tenant. 24 Cyc. 1114; McAdam on Landlord & Tenant, 1244, *el seq.;* Tiffany on Landlord & Tenant, 559; Robins v. Jones, 15 C. B. (N. S.) 221; Franklin v. Tracy, 25 Ky. Law Rep. 1409; Whitmore v. Pulp & Paper Co., 91 Me. 297; Doyle v. Railroad, 147 U. S. 425; Gately v. Campbell, 124 Cal. 520; Graff v. Brewing Co., 130 Mo. App. 622. (4) The lessor owes no duty to the lessee to discover defects which are not apparent to ordinary observation, in order that he may warn the lessee of any possible dangers. Bennett v. Sullivan, 100 Me. 118; Franklin v. Tracy, 25 Ky. Law Rep. 1409; Company v. Birney, 68 Oh. St. 328; Doyle v. Railroad, supra; Graff v. Brewing Co., 130 Mo. App. 618; Whitely v. McLaughlin, 183 Mo. 160; Glenn v. Hill, 210 Mo. 291; Shackleford v. Coffin, 95 Me. 69.

REYNOLDS, P. J.—In this case plaintiff, after filing an original and two amended petitions, to each of which demurrers were successfully interposed on the ground that they stated no cause of action, filed her third amended petition. In this she avers that she is an infant under the age of two years, that her father has been duly appointed her next friend, has duly qualified as such, and that she brings this action by that father as her next friend. It is then averred

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that on a day named her father, by a verbal contract, leased certain premises in the city of St. Louis, of the defendant, then the owner and in possession of them, for the purpose of residing therein with his family, including plaintiff; that afterwards Korach with his family, including plaintiff, took possession of and moved into and began the occupancy of the premises as a residence, "and plaintiff then and there became a tenant of this defendant." It is further averred that it was the duty of defendant, by the terms and conditions of the verbal lease, to have the premises in a safe and proper condition for the use and occupancy of plaintiff so that plaintiff could occupy them with safety, but it is alleged that the premises were not, at the time of the renting, and for a long time prior thereto had not been, in a safe condition; that there was located in one of the rooms a large fireplace or grate, over which was a large and heavy metal plate or metal sheet covering, so adjusted and placed that plaintiff could not see or know by the exercise of ordinary care that it was insecurely and improperly fastened and could not see or know that it was dangerous and unsafe and liable to give way and fall. Plaintiff avers that defendant negligently and carelessly permitted this metal sheet covering over the grate to be so placed, adjusted and maintained that at the time of the leasing it was dangerous to the occupants of the premises, including plaintiff, and that defendant knew or could have known by the exercise of ordinary care and prudence that it was dangerous and unsafe; that defendant could have repaired the same and prevented the happening of the injuries complained of but that defendant negligently and carlessly permitted this grate or plate to be and remain in the unsafe and dangerous condition thereby directly causing the injuries to plaintiff of which she complains. That on a day named and while plaintiff was occupying the premises and was on the floor of

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the parlor or sitting room in which this grate was located and while she was within about three feet of the fireplace, the metal sheet, plate, or covering over the grate, by reason of its unsafe, insecure and dangerous condition, as before mentioned, fell from its place onto and upon plaintiff, crushing and bruising her left hand, breaking and fracturing the second and third fingers of that hand and causing plaintiff severe pain and anguish. Charging that her injuries are serious and permanent and that she has suffered great pain of body and mind, she demands judgment for $5000.

A demurrer was filed to this petition on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained and plaintiff electing to stand upon the petition and declining to plead further, judgment followed in favor of defendant, from which plaintiff has duly perfected her appeal to this court.

The error here assigned is to the action of the court in sustaining the demurrer, it being argued that this third amended petition does state facts sufficient to constitute a cause of action.

Counsel for appellant make some reference to the abandoned petitions. It is a settled rule of practice in our State that by pleading over, as was done here, those abandoned petitions disappeared from the case and are not, so far as concerns the present case, open to consideration. No pretense is made that the demurrers to the abandoned petitions were improperly sustained.

The question here presented is on the liability of the landlord in damages to a member of the tenant's family, the tenant being in the occupancy of the whole of the premises, under a verbal lease. It will be noted that there is no charge of misrepresentation, misfeasance or concealment of fact by the landlord.

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Accepted writers on the law of landlord and tenant lay it down as the rule established by the great weight of authority, that the lessee cannot assert a claim for damages against the lessor on the ground that owing to the condition of the premises at the time of the leasing, he or a member of his family suffered physical injury by reason or in consequence of the condition of the leased property at the time of the letting; that there is no implied warranty in the contract of letting that the premises are tenantable or suitable for the purposes for which they were leased, or, in the case of a dwelling house, that it is either safe or convenient, and that where the landlord has created no nuisance and is guilty of no willful wrong or fraud or culpable negligence, he is not liable for any injury suffered by any person occupying or coming upon the premises during the term of the lease. [See 1 Tiffany on Landlord and Tenant, sec. 86, pp. 556-9; 1 McAdam on Landlord and Tenant (4 Ed.), p. 373; 2 *ibid*, p. 1313-15.] Our Supreme Court in Ward v. Fagin, 101 Mo. 669, 14 S. W. 738, has said (p. 674): "Of course, if the landlord is not bound to repair unless upon a covenant so to do, it must logically follow that any injuries arising from a failure on his part to repair can give no cause of action to the tenant, whether resulting to the tenant's goods or to his person. If the landlord owes no duty to his tenant in this regard, then certainly negligence cannot be imputed to him; for negligence can only spring from unperformed duty. [Cooley on Torts (2 Ed.), 791; Hallihan v. Railroad, 71 Mo. 113.] . . . And, if it be conceded, as it must (be) from the authorities, that the landlord is not bound to keep the leased premises in repair, the same principle will apply whether the tenant be lessee of the whole premises or of only a portion thereof; for what is true of the integer of non-liability must be equally true of each of its component fractions."

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The averment is that "it was the duty of the defendant, by the terms and conditions of the verbal lease aforesaid, to have said premises in a safe and proper condition for the use and occupancy of plaintiff so that plaintiff could occupy said premises with safety." This can hardly be construed into an averment that there was a covenant to repair—at most it is a conclusion drawn by the pleader on the verbal contract of letting.

In Glenn v. Hill, 210 Mo. 291, l. c. 296, 109 S. W. 27, our Supreme Court has stated the rule as follows: "There is no averment in the petition that under the contract of leasing the defendants agreed to repair, and in the absence of an agreement in the lease binding the landlord to put or keep the premises in repair, he is not liable in damages for failure to do so or for injuries sustained by the tenant by reason thereof."

The rule is very concisely stated in Robins v. Jones, 15 C. B. (n. s.) 221, l. c. 239, that "fraud apart, there is no law against letting a tumble-down house." The same rule is announced and fully discussed by the Kansas City Court of Appeals in Graff v. Brewing Company, 130 Mo. App. 618, 109 S. W. 1044.

In Marcheck v. Klute, 133 Mo. App. 280, l. c. 290, 113 S. W. 654, it is said, referring to the fact that a child of plaintiff had been killed by falling through an open chute in a building in which he was playing, "conceding plaintiff's children were licensed to play in the loft, defendants were under no duty to keep the floor safe for their use in that manner, and unless guilty of misfeasance, were not liable for an accident received by them."

This is not the case of a common passageway, the possession of which is in the landlord. In such a case "there is an implied obligation imposed by the law upon the landlord to exercise ordinary care to keep such common portion of the premises in a reasonably safe condition for such purposes as may reasonably

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be anticipated to be a proper use of the property for which it is let." [Karp v. Barton, 164 Mo. App. 389, l. c. 396, 144 S. W. 1111; Marcheck v. Klute, supra, l. c. 287. See, also, McGinley v. Alliance Trust Co., 168 Mo. 257, 66 S. W. 153.] These are all cases in which the injured party was a member of the family of the tenant, and in which the injury was sustained from defects in those parts of the premises which were in control of the landlord.

Here the father of plaintiff, the lessee, was in possession of the whole premises, a single dwelling, and without his permission, no one, not even the landlord, could enter to make repairs. [McGinley v. Alliance Trust Co., supra, l. c. 263.]

But if it be said that the petition avers a contract to repair, and recovery can be had for damages suffered by reason of the failure to repair, it is to be observed that the contract is averred to be with the father, not with plaintiff. Conceding that the contract inures to plaintiff as a member of the family of the lessee, she certainly can have no higher right than the lessee under the contract. As to that right it is said in the Marcheck case, supra, l. c. 291, "The weight of authority is that a lessor's covenant to repair will not support an action for a personal injury due to failure to make repairs, because those injuries are deemed too remote to have been contemplated by the parties when the covenant was given," citing cases. That rule was not applied in the Marcheck case—for reasons there given—but it does apply here. No promise is alleged to have been made by the lessor looking to special provision for guarding the children of the lessee, as was in evidence in the Marcheck case, but a mere general promise to repair is averred.

Our conclusion upon the case is that the demurrer to the third amended petition was properly sustained. The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

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JOHN BARTH, Respondent, v. KATIE BARTH, Appellant.

St. Louis Court of Appeals, December 3, 1912.

1. **APPELLATE PRACTICE: Divorce: Conclusiveness of Findings of Fact.** Although, in divorce cases, great deference should be paid to the conclusions of the trial judge on evidence given by witnesses who testify before him, the duty is imposed upon the appellate court to pass on the evidence and determine the case on its view of the evidence.

2. **DIVORCE: Trivial Grounds: Necessity of Coming into Court with "Clean Hands."** When it becomes apparent that the true aims of the union of a husband and wife can no longer be achieved by continuing the marital tie, the best interests of society does not demand that it be preserved by mere force of law; but it is the duty of the courts to see that it is not dissolved on slight testimony, for light or trivial causes, or when neither party comes into court with "clean hands."

3. **———: Both Parties at Fault: "Injured Party."** Where both parties to a divorce suit are at fault, the court will not attempt to find which is the more at fault, but will award neither a divorce.

4. **———: ———: ———: Sufficiency of Evidence.** In an action by a husband for divorce on the ground of indignities rendering his condition intolerable, evidence *held* to show that defendant had been guilty of such indignities as would warrant the granting of a divorce to plaintiff; evidence further *held*, however, to show that plaintiff had been guilty of indignities toward defendant, and, therefore, that he was not the "injured party," within Sec. 2370, R. S. 1909; and hence it is *held* that he was not entitled to a divorce.

Appeal from St. Louis City Circuit Court.—*Hon. Edwin W. Lee*, Judge.

REVERSED AND REMANDED (*with directions*).

Jno. B. Dempsey and *Albert Burgess* for appellant.

(1) A plaintiff in a divorce suit in order to secure a decree of divorce, must be shown, from all the evi-

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dence introduced in the trial, to be not only the injured but also the innocent party. Lawlor v. Lawlor, 76 Mo. App. 637; Torlotting v. Torlotting, 82 Mo. App. 192; Webb v. Webb, 44 Mo. App. 229; Coe v. Coe, 98 Mo. App. 472; Nichols v. Nichols, 39 Mo. App. 291. (2) Either husband or wife to obtain relief from bonds that have grown too burdensome must come into court with clean hands. Libbe v. Libbe, 157 Mo. App. 701; Torlotting v. Torlotting, 82 Mo. App. 192.

Edward W. Foristel for repondent.

REYNOLDS, P. J.—The respondent here instituted an action for divorce against his wife, the appellant, on the 19th of May, 1910.

It is alleged in the petition that the parties were married in the city of St. Louis, in May, 1895, and lived together as husband and wife until April, 1910. Following the usual averment that during all of the time plaintiff had treated defendant with kindness and affection, plaintiff charges that defendant offered him such indignities as to render his condition intolerable. The indignities set out are that after the first year of the marriage defendant developed a violently jealous disposition and on divers occasions accused plaintiff of infidelity; that after the third year of the marriage on numerous occasions, "the exact dates of which are unknown to this plaintiff, which plaintiff believes to have been about once each month," defendant quarrelled with plaintiff and during the quarrel used foul and profane language toward him, on numerous occasions breaking various articles about the house and throwing dishes at plaintiff. Averring that plaintiff was a merchant engaged in the retail meat and provision business, it is charged that on divers occasions too numerous to mention, defendant would appear at plaintiff's place of business and without reasonable cause abuse the women patrons who happened to be

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present in plaintiff's place of business at the time and would accuse them of being intimate with plaintiff; that during the second year of the marriage, "the exact date being unknown to plaintiff," defendant without reasonable cause and while in a violent fit of temper, threw a meat axe through the front window of plaintiff's place of business; that thereafter during the year 1904 plaintiff was compelled to dispose of his business by reason of the habits, acts and practices of defendant as aforesaid. It is further averred that during the year 1909, a sister of defendant came to live with plaintiff and defendant, and defendant, without reasonable cause accused plaintiff of being intimate with the sister; that for a period of three years next before the filing of the petition, "on occasions too numerous to mention," defendant, in the presence of others, threatened to kill plaintiff, on one occasion threatening to cut plaintiff's throat while asleep; that during the month of March, 1910, defendant was continually quarrelling with an emplyee of plaintiff and on one occasion threatened to throw carbolic acid in his face; that on the 15th of March, 1910, defendant at the breakfast table and in the presence of the children of plaintiff and defendant, without reasonable cause, accused plaintiff of being intimate with some Spanish ladies who lived in the neighborhood; that thereafter, on or about the 1st of April, 1910, defendant "forbids the women patrons of plaintiff to talk to plaintiff or to come into his place of business on any purpose." Stating that by reason of the habits, acts and practices of defendant, as before set out, he has suffered great anguish of wind and cannot live in peace and happiness with defendant and that there were born of the marriage two children, John aged fourteen, and Harry aged twelve, and that the defendant is an unfit person to have the care and custody of the children, plaintiff prays for divorce and that he be awarded the care and

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custody of the children, the petition containing the proper averment of residence in this city and State.

Admitting the marriage and birth of the children, defendant by her answer denies every other allegation in the petition.

The trial of the cause was quite lengthy and terminated in a finding and judgment in favor of plaintiff, the court also awarding him the custody and control of the children and adjudging the cost of the proceeding against defendant.

We have read all the testimony as presented by the abstract of the appellant with very great care. While conceding that very great deference is to be paid to the conclusions of the learned trial judge on the evidence in a case of this character, he having the witnesses before him and hearing their testimony and being able to determine from the manner of giving the testimony and appearance of the parties and witnesses, the weight to be given to it, the duty is imposed upon us by the law to pass on the evidence and to determine the case on our own view of that evidence as presented to us by the record, a duty which we cannot shirk, even if we had the disposition to do so. This rule of decision was very distinctly annouced by our court in Torlotting v. Torlotting, 82 Mo. App. 192, and, while stating the rule with great distinctness, the decision of the trial court was not there followed, a divorce which it had adjudged in favor of the husband as against the wife being set aside and the case dismissed. It is true that that was done more on the application of the principles of law to the facts than on the facts themselves. Nevertheless it is a very clear example of the appellate court refusing to follow the conclusion of the trial court on the facts. That this has always been the rule of decision in this State is shown by the many cases cited in the Torlotting case.

It may appear somewhat banal to call attention to the importance of the marriage contract, a civil con

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tract, it is true, under our Constitution and laws, but a contract that lies at the very foundation of society and, in a measure, of government itself. When it becomes apparent that the true aims of the union of a man and woman can no longer be achieved by continuing the marital tie, it can hardly be that the interests of society demand that the union be preserved by mere force of law, but it is for the courts to see to it that that union is not dissolved on slight testimony, nor for either light or trivial causes. Nor is it to be dissolved, however galling its bonds may have become, if neither of the parties to it comes into court with clean hands. It is of the very essence of our statute governing divorce that the party to whom it is awarded is the innocent and injured party. Where both parties are in fault the court, not attempting to weigh with nicely adjusted scales which of the two is the most or the least in fault, will award to neither the relief sought.

Section 2370, R. S. 1909, the section which enumerates the causes for divorce, concludes thus; "The injured party, for any of the causes above enumerated, may obtain a divorce from the bonds of matrimony." This rule, that the divorce is only to be granted to the injured party is further emphasized by the provisions of section 2372, authorizing a divorce in favor of the defendant, it being there provided that "Upon the hearing of the cause, if the court shall be satisfied that the defendant is the injured party, it shall enter judgment divorcing the defendant from the said plaintiff, as prayed in the answer. These provisions have not always been in our statutes regulating the matter of divorce in their present wording. Prior to the Act of March, 12, 1849 (Session Acts 1849, p. 49, chap. 55, 1 R. S. 1855, p. 662, sec. 1), our law provided that "the innocent and injured party" may obtain a divorce. [R. S. 1845, chap. 53, p. 426.] But our Supreme Court in Hoffman v. Hoffman, 43 Mo. 547, held (l. c. 549), referring to the change in the wording of the law, that

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"the statute should receive the same construction in this respect as before the change; at least no better character should be required of a party seeking a divorce, and we are not inclined to allow it to a person sustaining a worse one." One of the earlier, if not the first, of the cases on our statute relating to divorce is Ryan v. Ryan, 9 Mo. 535, decided in 1845. Ryan v. Ryan is referred to with approved in Nagel v. Nagel, 12 Mo. 53, decided in 1848. In this latter case, referring to the statute, it is said (l. c. 55): "Thus it is seen that a party applying for a divorce must show that he or she is the innocent and injured party; otherwise the court should not grant the divorce." This construction of the statute, a construction placed upon it at a very early period in our history as a State, has been adhered to by our courts from that day to this, notwithstanding the change in its phraseology, as we have seen. It has always been held, as said by the court in Hoffman v. Hoffman, supra, l. c. 549, that "the least that can be required, . . . would be to compel parties to come into court with hands so far clean, at least, that the opposite party is not entitled to the same redress from them."

Reviewing the testimony in this case, we have no hesitancy in saying that we agree with the finding of the trial court that the defendant in this case is guilty of the perpetration of sufficient of the acts charged by plaintiff in his petition to have entitled plaintiff to a divorce, provided he was without fault himself. We are not to be understood as finding that plaintiff has sustained all of his charges; we do not think he has sustained the most serious of them. That defendant used violent language toward plaintiff, was quarrelsome on occasions, is fairly well proven; so also there is evidence tending to show that on at least one occasion she charged him with too much familiarity with other women. These facts appear in evidence, although it must be said the evidence as to them is slight.

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But there is just as much evidence presented in this record before us of unjustifiable acts by the plaintiff during the married life of the parties as of like acts by defendant. There is no substantial evidence that defendant's acts caused plaintiff to close up his business. On the contrary the evidence tend to prove that defendant had always helped plaintiff in his business and that without any apparent cause to do so, plaintiff closed up his business as a merchant and practically without any notice whatever to his wife of his intention so to do, left her and the two children born of the marriage alone in St. Louis and visited his native land, leaving with his wife, for the support of herself and children during his absence of some two months, the sum of $100. He did not inform his wife, according to her testimony, and it is uncontradicted, of his intention to leave her and the family and make this long visit to a foreign land, until the very morning that he left. When he did leave he did not kiss either his wife or his children good-bye, and at five o'clock of the morning of the day he left, he for the first time told his wife of his intended departure. When he returned from his visit to his native land, it appears, according to his own testimony, that it was three days after his return before he entered the home. He testifies that when he came back from Germany he went home and there was no one about the house; that the shutters were shut, the doors locked and he went back to a friend of his and stayed there for another day; went back home again and it was still closed and it was the third day after his return when, as he says, he went to work and broke in the door and went inside, and his wife was not there. He is without any corroboration as to this. His wife's testimony as to the matter, and in this she is corroborated by other witnesses, is, that during these three days when he was in the city she was occupying the house with her children and that on the third day, that is the day upon which

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plaintiff broke into the house as he said, she had been staying for part of the day with her children at her mother's, a short distance away from the home, and when she returned to her home she found her husband sitting on the doorstep. In all material matters connected with the relations between them the wife emphatically denied every one of the accusations contained in the petition or testified to and in a very great many of them she is corroborated in her denial by the testimony of others. According to his own testimony the quarrelling between these parties commenced a year after their marriage. They were married in May, 1895, and the plaintiff testifies that within a year after that and continually from then on the differences commenced between them and that they had been kept up ever since. But they lived together from May, 1895, to May, 1910—were even at the time of the trial living in the same house. Two sons were born to them of the marriage. That they quarrelled is beyond question: that he was sullen and sulky when at home with his wife and family is testified to, not only by his wife but by his own witnesses. Viewing this case throughout and considering all of the testimony in it, we have concluded that plaintiffff is not an innocent party within the meaning of the statute and is not entitled to a decree. Moreover, we see no reason to prevent them renewing their marital relations and uniting in the uprearing of the two sons, both young, born to them of the marriage.

The judgment of the circuit court is reversed and the cause remanded with directions to that court to dismiss it at the cost of the plaintiff. *Nortoni* and *Caulfield, JJ.*, concur, the latter only in the result.

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ALEX HIGHT by Next Friend, Respondent v. AMERICAN BAKERY COMPANY, Appellant.

St. Louis Court of Appeals. Submitted on Briefs November 11, 1912. Opinion Filed December 3, 1912.

1. **APELLATE PRACTICE: Binding Effect of Theory at Trial: Negligence: Pleading.** Where the petition, in an action for personal injuries, is constructed on the "turntable doctrine" of negligence and the case is submitted to the jury on that theory, plaintiff is bound by that theory on appeal.

2. **NEGLIGENCE: "Turntable Doctrine:" Essential Elements.** In order that an action for injuries to a child may be maintained under the "turntable doctrine" of negligence, it is necessary that the machinery or appliance, the operation of which was the direct cause of the injury, be dangerous in itself, when set in motion, or be of a kind liable to become dangerous from the position or condition in which it is left, if set in motion, and defendant must be guilty of negligence in leaving such machinery or appliance unguarded, unsecured or unattended, in an open place frequented by children, so as to allow of its being put in motion by them.

3. ———: ———: **Applies Only to Children.** The "turntable doctrine" of negligence is applied only in those cases in which the person injured is a child of tender years—on the borderland, as to age, between the irresponsibility of childhood and the responsibility of mature years.

4. ———: ———: **Applicable Only to Defeat Contributory Negligence.** The negligence of the defendant lies at the very foundation of liability under the "turntable doctrine," and unless that is proved, the doctrine may not be invoked; and, indeed, it is to be invoked only to meet the defense of contributory negligence on the part of the plaintiff, and not as the foundation of liability on the part of the defendant.

5. ———: ———: ———: **Difference Between Negligence and Actionable Negligence.** While the act of suffering a dangerous appliance, which, in itself or in its position, is a menace to children, to remain unguarded, is an act of deliberate carelessness, it does not necessarily follow that an action will lie for injuries sustained therefrom, since negligence and actionable negligence are distinguishable terms, and carelessness does not always involve liability, but before liability attaches, a duty on the part of the party charged toward the party injured must arise.

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6. **PLEADING: Defective Petition: Aider by Verdict.** Where defendant pleads over after his demurrer to the petition is overruled and a verdict is returned and a judgment is rendered for plaintiff, the fact that the petition states the cause of action counted on in an imperfect manner is not a ground for setting aside the verdict or arresting the judgment.

7. **NEGLIGENCE: Child Injured by Wagon: "Turntable Doctrine:" Sufficiency of Evidence: Burden of Proof.** Defendant's servants, for the purpose of advertising its products, threw into the air from one of its wagons in their charge, which was being driven along slowly, certain whirligig toys. Plaintiff, a boy ten years old, and other children followed the wagon, endeavoring to procure the toys when they fell to the ground. One of the toys fell under the slowly moving wagon, and plaintiff reached between the wheels for it, and one of the rear wheels passed over his arm, causing the injury complained of. Plaintiff brought suit under the "turntable doctrine" of negligence, and his petition, among other things, alleged that it was the purpose of defendant, in causing said wagon to pass along the street and in causing the whirligigs to be thrown into the air, to attract the attention of children thereto. *Held*, that this averment was not sustained by the evidence; *held, further*, that the burden of proving this averment rested on plaintiff.

8. ———: ———: ———. Where the purpose of a person sending up advertising toys from a wagon is to attract children and cause them to congregate around the wagon for the purpose of increasing his business, he owes the children who so congregate a very different duty from that which he owes a child who gets in the way of the wagon through his own impulse and without the knowledge or consent of such person.

9. ———: ———: ———: **Sufficiency of Evidence: Contributory Negligence: Facts Stated.** Defendant's servants, for the purpose of advertising its products, threw into the air from one of its wagons in their charge, which was being driven along slowly, certain whirligig toys. Plaintiff, a boy ten years old, and other children followed the wagon, endeavoring to procure the toys when they fell to the ground. One of the toys fell under the slowly moving wagon, and plaintiff reached between the wheels for it, and one of the rear wheels passed over his arm, causing the injury complained of, for which he brought suit under the "turntable doctrine" of negligence. *Held*, that, although the toys were attractive to children, the act of throwing them from the wagon or the failure of defendant's agents to watch their flight was not actionable negligence, and there being no proof that the wagon was driven negligently, or that defendant's servants had knowledge of

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plaintiff's dangerous position, and plaintiff never having been in front of the team, defendant's servants were not guilty of negligence in failing to look behind to see that he did not get under the rear wheels; and hence it is *held* that defendant was not guilty of actionable negligence and, therefore, plaintiff was not entitled to recover. *Held, further*, that plaintiff was guilty of contributory negligence in placing his arm between the wheels of the moving wagon, and that the "turntable doctrine" was inapplicable and could not be employed to relieve him of his contributory negligence.

10. ———: **Driving Wagon: Duty of Driver.** It is the duty of the driver of a wagon to look ahead, in the direction in which he is going, and he is not guilty of actionable negligence in failing to look behind to see what happens after the wagon has passed.

11. ———: **Child Injured by Wagon: "Turntable Doctrine:" Contributory Negligence.** Where a ten-year-old boy placed his arm between the wheels of a moving wagon to seize a toy which had fallen under the wagon, knowing that, if the wagon did not stop and he did not get his arm out in time, the wheel would pass over and injure it, and he was so injured, he was guilty of contributory negligence as a matter of law.

12. ———: ———: ———: **Proximate Cause.** Where, in order that he might seize a toy which had been thrown from a slowly moving wagon and which had fallen under the wagon, a ten-year-old boy placed his arm between the wheels, and one of the rear wheels caught and injured it, his act in placing his arm between the wheels, and not the attractiveness of the toy, was the proximate cause of the injury.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

REVERSED.

Merritt U. Hayden and *H. H. Scott* for appellant.

(1) The law of the "turntable cases" or, as it is frequently called, the "attractive nuisance" doctrine cannot, properly, be applied to the facts of this case, to determine the liability of appellant, for the following reasons: (a) The record does not disclose any negligence on the part of the appellant with re-

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spect to the maintenance or manipulation of the alleged attractive device. This doctrine is one which affects only the question of contributory negligence. It cannot be relied on to establish the negligence of the defendant, in any case, to which it is applicable. There is no phase of the "attractive nuisance" doctrine which operates to relieve the plaintiff in such a case of the burden of proving the negligence of the defendant, just as in other cases. Lynch v. Nurdin, 1 Ad. & El. (N. S.) 29; Bottum's Admr. v. Hawks, 79 Atl. 858; Friedman v. Snare & Triest Co., 71 N. J. Law 605; Birge v. Gardiner, 19 Conn. 507; Dailey v. Railroad, 26 Conn. 591; Curley v. Railroad, 98 Mo. 13; Kay v. Railroad, 65 Pa. St. 276; Porter v. Brewing Ass'n, 24 Mo. App. 1; Brewing Ass'n v. Talbot, 140 Mo. 674; Hall v. Telephone Co., 141 Mo. App. 183; Kelly v. Benas, 217 Mo. 1; Witte v. Stifel, 126 Mo. 295. (b) The alleged attractive device, the whirligig, was not, in and of itself, dangerous. Inherently, it was neither a dangerous object nor a dangerous attraction. Rushenberg v. Railroad, 109 Mo. 112; Smith v. Packing Co., 82 Mo. App. 9; Houck v. Railway, 116 Mo. App. 559; Fitzgerald v. Rodgers, 68 N. Y. Supp. 946; Compton v. Railway, 147 Mo. App. 126; Barney v. Railroad, 126 Mo. 372; Water & Light Co. v. Webb, 129 Kentucky, 395; Thompson v. Telephone Co., 127 S. W. 531; (c) The whirligig was not only not inherently dangerous, but, on the occasion of this accident, it was not so manipulated by appellant's employees as to allure, or entice, respondent into a place of hidden danger. Keffe v. Railway, 21 Minn. 207; Berry v. Railroad, 214 Mo. 593; Kelly v. Benas, 217 Mo. 1; Cases cited under subdivision (b). (d) Appellant's employees were not bound to anticipate, when they threw out the whirligig, either that the wind, in spite of their manipulation of the whirligig, would carry it under the wagon, or that respondent would drop down beside the wagon and reach under and immediately in front of the approach-

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ing rear wheel in his effort to get it. Kay v. Railway, 65 Pa. St. 276; Porter Brewing Assn., 24 Mo. App. 1; American Brewing Ass'n v. Talbot, 140 Mo. 674; Keffe v. Railway, 21 Minn. 207; Saxon v. Transfer Co., 155 Mo. App. 693; Hall v. Telephone Co., 141 Mo. App. 183; Strode v. Box Co., 124 Mo. App. 511; Wilkerson v. Railroad, 140 Mo. App. 306. (e) There was nothing connected, either with the whirligig itself or with its maintenance or manipulation by appellant, or its employees, embracing the "element of nuisance." Compton v. Railway, 147 Mo. App. 126; Rushenberg v. Railway 109 Mo. 112; Barney v. Railroad, 126 Mo. 372; Curley v. Railroad, 98 Mo. 13; Cases cited under subdivisions (a) and (b). (f) The doctrine of the "turntable cases," repudiated by the courts of many states, and declared of doubtful soundness by those of others, will not be extended by the courts of this State to cover cases not "coming strictly within the limits of the doctrine and presenting every earmarking element upon which liability is predicated" in those cases to which it is applied. Kelly v. Benas, 217 Mo. 1; Curley v. Raliway, 98 Mo. 13; O'Hara v. Gas Light Co., 148 S. W. 884; Barney v. Railroad, 126 Mo. 372; Houck v. Railway, 116 Mo. App. 559; Kaumeier v. Railway, 116 Mich. 306; Marcheck v. Klute, 133 Mo. App. 280; Middleton v. Reuter, 141 App. Div. (N. Y.) 517; Thompson v. Telephone Co., 138 Ky. 109; Stendal v. Boyd, 73 Minn. 53; Stone Co. v. Pugh, 115 Tenn. 688; Harris v. Cowles, 38 Wash. 331; Bottum's Admr. v. Hawks, 79 Atl. 858. (2) Even if this were a case for the application of the doctrine, appellant is still not liable for the reason that the undisputed testimony discloses that the proximate cause of this respondent's injury was not the influence of the alleged attractive object, operating to prevent him from exercising care for his safety, but the determination on his part to defeat the other boys in the enterprise of getting this whirligig. The conduct of respondent, in view of his

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age, intelligence, capacity and experience, amounted to contributory negligence, as a matter of law, and should have been so declared by the trial court. Twist v. Railroad, 39 Minn. 170; Bishop v. Railroad, 14 R. I. 314; Herdt v. Koenig, 137 Mo. App. 589; Spillane v. Railway, 135 Mo. 414; Payne v. Railway, 136 Mo. 562; Graney v. Railway, 157 Mo. 662; Walker v. Railroad, 193 Mo. 453; McGee v. Railroad, 214 Mo. 530; Mann v. Railroad, 123 Mo. App. 486; Seymour v. Stock Yards Co., 234 Ill. 579. (3) Appellant's employees were not negligent in driving on after respondent assumed the position of peril described by him. There is no testimony in the record tending to show that they either saw, or, by the exercise of ordinary care, would have seen, respondent in time to have averted this accident. The facts of this case do not bring it within the application of either the humanitarian or the last chance doctrine. Stuart v. Street Railway, 210 Mass. 240; Rice v. House Moving Co., 17 App. Div. (N. Y.) 462; Hebard v. Mabie, 98 Ill. App. 543; Curley v. Railway, 98 Mo. 13; McGee v. Railway, 214 Mo. 530; Nivert v. Railway, 232 Mo. 626.

Senaca N. Taylor for respondent.

(1) Negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such person suffers injury. Feeny v. Railroad, 123 Mo. App. 420; O'Hara v. Gas L. Co., 131 Mo. App. 428; Gallagher v. City of Tipton, 133 Mo. App. 557; Liene v. Cont Co., 134 Mo. App. 562; Combs v. Kirksville, 134 Mo. App. 649; Hillerbrand v. Merc. Co., 141 Mo. App. 122; Booker v. Railroad, 144 Mo. App. 282; Compton v. Railroad, 147 Mo. App. 414; Nagel v. Railway, 75 Mo. 659; Schmidt v. Dist. Co., 90 Mo. 294; Wenker v. Railway, 169 Mo. 592; Berry v. Railroad, 214 Mo. 594;

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Glaser v. Rothschild, 221 Mo. 181. In the case at bar plaintiff was not ten years old when injured. Defendant's employees having charge of the wagon, saw him and other boys playing upon the street, and in throwing up these whirligigs, knew that they would attract and entice these little boys in an effort to obtain them. The sole object of winding up these toys and throwing them in the air was to awaken the curiosity, attract, excite and cause the boys to struggle to get them, and so advertise defendant's bread and increase its sale. Defendant's employees knew that boys of tender years were heedless of environment and that their eagerness to get one of these attractive toys would make them thoughtless of danger. Undeniably, all this was known to defendant's employees who were driving this decorated wagon over the most populous streets of the city, and winding up these whirligigs and throwing them from the wagon into the air. It was the duty, therefore, of the defendant's employees, if they desired to advertise bread, by such means, to have stopped the wagon until the whirligigs thrown in the air had been gotten by the boys, and to see that no child would be injured in their eager attempt to get one of these toys, while the wagon was in motion. This they failed to do and such failure was negligence directly causing plaintiff's injuries. From the undisputed evidence under the authorities above cited, it was the duty of the trial court to submit to the jury the question of defendant's negligence. (2) Where a boy uses the care reasonably to be expected from one of his years and capacity, he is not guilty of contributory negligence, and whether or not he did use such care is a question for the jury. Donaho v. Iron Works, 7 Mo. App. 450; Rogers v. Meyerson Print. Co., 103 Mo. App. 683; Overmeyer v. Scheer, 120 Mo. App. 70; Winkel v. Peck D. G. Co., 132 Mo. App. 656; Donaho v. Iron Works, 75 Mo. 401; Schmidt v. Dist. Co., 90 Mo. 294; Williams v. Railway, 96 Mo. 275; Dowling

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v. Allen, 102 Mo. 213; Schmidt v. Railway, 119 Mo. 256; Van Natty v. Railway, 133 Mo. 13; Railroad v. Gladman, 15 Wal. 401; Railroad v. Straus, 17 Wal. 675; Railroad v. Fitzsimmons, 22 Kan. 686; Hydraulic Co. v. Orr, 38 Pa. St. 322. (3) Before the court can declare as a matter of law that the defendant was not guilty of negligence or that plaintiff was guilty of contributory negligence, the evidence must be such that all fair-minded men will say that defendant was not guilty of negligence as charged, or that plaintiff was guilty of contributory negligence, and not such that reasonable men might differ in respect thereto. Herboth v. Gaal, 47 Mo. 255; Moore v. Transit Co., 95 Mo. App. 728; Combs v. Kirksville, 134 Mo. App. 649; Shamp v. Lambert, 142 Mo. App. 567; Johnson & Co. v. Ice Ref. Co., 143 Mo. App. 442; Wyler v. Ratican, 150 Mo. App. 481; Munro v. Railroad, 155 Mo. App. 711; Lamb v. Railroad, 147 Mo. 171; Murrell v. Smith, 152 Mo. 95; Weller v. Railway, 164 Mo. 181; Erickson v. Railway, 171 Mo. 647; Wilkerson v. Railway, 175 Mo. 161; Eckhardt v. Transit, 190 Mo. 593; Railroad v. Converse, 139 U. S. 469; Railroad v. Ives, 144 U. S. 408; Railroad v. Powers, 149 U. S 43; Railroad v. Griffiths, 159 U. S. 603; Railway v. Gentry, 163 U. S. 353; Warner v. Railroad, 168 U. S. 34; Railroad v. Landrigan, 191 U. S. 461.

STATEMENT.—Action by an infant for damages alleged to have been sustained by him by reason of a wagon of the defendant, appellant here, running over and injuring his arm, the infant suing by his father as next friend. The action was brought against the American Bakery Company and the Heydt Bakery, alleged to be a branch of the company. After a recital of the minority of plaintiff and the appointment of his father as his next friend, the amended petition upon which the cause was tried avers that plaintiff, then being a minor under the age of ten years, on Saturday

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the ninth of July, 1910, was playing with other boys mostly older than himself, on Dickson street in the city of St. Louis near his home, and while so playing the defendants caused a large wagon, similar to a transfer wagon, to be driven through Dickson street in the locality where plaintiff was playing, from which wagon defendants caused to be thrown into the air, large numbers of toys consisting of whirligigs, on which defendant advertised certain of the commodities it had for sale; that said whirligigs were whirled into the air and would come down in different directions as they were carried by currents of the air; that it was the purpose of defendants in causing the large wagon to pass through Dickson street and causing the whirligigs to be thrown into the air to attract the attention of children thereto, and that the whirligigs were exceedingly attractive to children and in this way defendants sought to advertise and did advertise their commodities; that on the occasion mentioned while numerous children were attracted to the place where defendants' employees were driving the wagon and whirling the whirligigs into the air, many boys were attracted thereto and struggled with each other to obtain the whirligigs as they fell through the air to the street and around and under the heavy wagon; that plaintiff being a child under ten years of age and not having the discretion of a larger boy or adult, saw one of these whirligigs fall under the wagon and rushed to obtain it, placing his hand and arm under the wagon to get the whirligig, and defendants' employees who were driving the wagon then and there carelessly and negligently caused the hind wheel of the wagon to pass over plaintiff's right arm, crushing the bone and flesh above the elbow so as to maim and cripple the plaintiff for life. It is further averred that the defendants and their employees in driving the wagon and throwing the whirligigs into the air knew or by the exercise of ordinary care could have known that these toys would

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attract plaintiff and other children of immature understanding into a place of danger of being injured by the wagon and cause them to rush to obtain such of the whirligigs as would fall under the wagon and that in doing so they were likely to maim or kill such children by running over them; "that the act of so driving over the streets with such heavy wagon, throwing such whirligigs into the air, as aforesaid, and thereby enticing children to struggle to obtain the whirligigs, and to place their hands and arms under the wagon to obtain the same, and driving heedlessly, without noticing a child who had put his hand and arm under the wagon to obtain such whirligig, and passing over and crushing and breaking his arm, was an act of negligence on the part of defendants." Averring that in consequence of the injuries plaintiff had suffered great physical pain and mental anguish and will continue to suffer the same for many years and that he is injured, crippled and maimed for life and his earning capacity, after he attains the age of twenty-one years, will be greatly diminished in consequence of his injury, plaintiff prays judgment for $7500, with interest and costs.

The American Bakery Company, in its answer, after denying each and every allegation in the amended petition, sets up a plea of contributory negligence on the part of plaintiff, the contributory negligence alleged being that plaintiff had carelessly and negligently crawled under the wagon and between the front and rear wheels thereof while the wagon was in motion and proceeding along the street, and in so doing carelessly and negligently allowed his right arm to get under the rear wheel of the wagon.

A reply denying this was filed.

The trial coming on before the court and a jury, plaintiff dismissed as to the defendant Heydt Bakery and thereafter the trial proceeded against the American Bakery Company alone and resulted in a verdict

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and judgment in favor of plaintiff and against that defendant in the sum of $600, from which, after interposing a motion for new trial as well as a motion in arrest of judgment and saving exception to the overruling of these motions, the American Bakery Company duly perfected its appeal to this court.

The learned counsel for appellant, in their printed argument upon which the cause is submitted, state that errors are assigned in only two respects in this case, aimed at the foundation of respondent's right to recover, and that question, counsel frankly state, is the only one they present for the consideration of the court; and whether error exists in the matter of giving or refusing instructions, save as to the instruction in the nature of a demurrer to the evidence, is a question which counsel say they will not discuss "for the reason that if respondent is entitled to recover under the theory pleaded and the evidence offered, we have no fault to find with the verdict and we see nothing to be gained by another trial." This very frank statement of counsel leaves as the only matters for our consideration the evidence and the action of the trial court in overruling the demurrer thereto. It is the contention of counsel for appellant that there is an entire failure of proof in the case entitling plaintiff to a recovery, and that the evidence in the case proves that under the law, plaintiff cannot recover.

The determination of these points involves a careful consideration of the testimony in the case.

Preliminary to taking up the testimony as to the accident, it is as well to say that the appliance referred to as a whirligig in the petition was also called an aeroplane by those who testified. One of these whirligigs was in evidence and a photograph of it is in the abstract. We shall hereafter designate it as the toy. Without reproducing the photograph, it is sufficient to say of the toy that it appears to have been composed of a pasteboard stem about eight inches

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long and about five-sixteenths of an inch in diameter. The stem is about the size of an ordinary lead pencil. It is hollow in the center. At either end two small wires about as large in thickness as a very small pin extend out at right angles from the stem for a distance of four inches and then each wire bends, forming practically a right angle with the balance of the wire, and extends then about two inches. On each of these wires thus shaped a pice of very thin glazed paper is pasted so that each piece of paper is triangular in shape These pieces of paper constitute what may be called "wings." By taking hold of the stem and holding it stationary and winding the two wings at the bottom and then letting go of the stem, this toy will sail through the air until the two wings, thus wound up, unwind, when the toy will drop to the ground. Small rubber bands extend from the wires, through the hollow part of the stem, and the winding process consists of simply twisting these rubber bands around each other until they are tight, the unwinding of these bands causing the wings of the toy to revolve, thus keeping the toy in the air as long as that continues, dependent also on the velocity of the wind. There was no controversy over the fact that this toy was an advertising device, having printed on the wings matter calling attention to defendant's products. When sent up from the wagon by whoever was manipulating it in the manner before described, the toy will sail in whatever direction the wind happens to carry it.

Turn now to the testimony as to the happening of the accident.

Alexander Hight, the plaintiff, offered as a witness, was questioned by the court as to his conception of the obligation of an oath. Plaintiff, being accepted as a competent witness, said he was ten years old; had been going to school for four years. He testified that he was ten years of age in August following the accident, which had occurred on Saturday, July 9,

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1910; that about eight o'clock on the morning of the day of the accident he was on the corner of Dickson street and Garrison avenue, playing with three other boys; saw the wagon around the corner. The people on the wagon threw out one of these toys and the boys ran after it and it flew under the wagon. He (plaintiff) thought the wagon was stopping. He stuck his hand under the wagon to get the toy which had fallen there or which had been carried there. The wagon then began to go faster and ran over his hand, or more properly, the arm, and crushed it. He did not remember how many of these toys had been thrown out before he was hurt. One of the boys on the wagon took the toy from under the seat and wound it up and it began flying around the wagon. After it flew under the wagon he (plaintiff) went to get it. When he undertook to do that he did not think of the wagon going over his arm; that when one of these toys had been thrown up before, the boys all began running after it. Plaintiff exhibited his injured arm to the jury.

On cross-examination plaintiff testified that his home was on the north side of Dickson street, about eight houses east of Garrison avenue; had lived in that house about four years, during all of which time he had attended the Divoll School, which is about a block south of where plaintiff lived. On the morning of the accident he was playing on the corner of Dickson street and Garrison avenue; was playing on the south side of Dickson street in front of the house in which one Charles Barnett lived; was on the south side of Dickson street when he first saw the wagon. He and the other boys were playing with some pictures and after awhile the wagon came around the corner and they were throwing out these toys and he and the other boys all ran after them and one of the toys flew under the wagon and began whirling around. He did not remember how many toys he saw thrown

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out that morning; had seen some others thrown out but did not know where they went. When the one was thrown out which he tried to get, the wagon and team were two or three houses east of Garrison avenue; that before the wagon got around the corner he (plaintiff) was in front of Charles Barnett's house; when the whirligig was thrown out he (plaintiff) went further down the street, all the time on the south side of the street. The people on the wagon threw out the toy on the north side and it began going around on the north side. He ran around the back end of the wagon to the north side of it, got on his knees and reached between the front and rear wheels on the north side of the wagon. When he got on the north side of the wagon he was within fifteen or twenty feet from the car track. During all this time the team was moving, the driver of it sitting on the south side of the wagon. There were milk cans on the wagon, piled up about two feet or more, the highest part of the load being in the middle of the wagon. The top of the row of cans in the center of the wagon came above the top of the seat about a foot. The driver was sitting on the south side of this row of cans, sitting on the seat of the wagon. After the wagon ran over his arm it went about four houses and then stopped. The team was walking all the time, going very slowly. When plaintiff started for the south side of the street to run around the rear end of the wagon, he did not notice what the driver was doing. The remainder of his testimony related to the extent of his injury. On being recalled for further cross-examination, plaintiff testified that the wagon referred to was a large wagon and that he did not think at the time that if he got his arm under the wheel he would be hurt; he thought the wagon had stopped; he knew if he got in front of a moving wagon or got his hand under the wheel and the wheel ran over it, he would be hurt but he "thought this wagon would stop and wouldn't go for a long time." This is sub-

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stantially all the testimony of plaintiff himself relating to his injury.

A witness named Blum, testifying for plaintiff, said in direct examination that he was a shoemaker by trade, living at 2933 Dickson street. He was on the front stairway of his house on the day of the accident examining his mail. He saw a team and wagon, the latter loaded with fancy milk cans and one man standing in the center of the wagon throwing off some toys and two men sitting on the wagon; that the toys that he saw were similar to one shown at the trial; saw one of them fly around the wagon and around the horses and eight or ten boys were running after it to get hold of it. Witness looked back at his mail and in a half minute heard something and looking again saw plaintiff being pulled from under the wheels of the wagon; saw the children running to get these toys; after the accident, had assisted in carrying plaintiff to his home, he living in the same apartment with plaintiff and knowing him before he was hurt. On cross examination he testified that he saw the team come from the south side of Garrison avenue and turn east on Dickson street, keeping on the south side of that street. There was a single car track on Dickson street and the wagon was on the south side of the car track and going east. It was about three doors away from the corner of Garrison avenue on Dickson street that he saw them take plaintiff from under the wagon. When the accident occurred witness was three or four houses east of where the accident occurred and when it occurred the wagon was going toward the east. The horses were proceeding at a walk. The boys were taking plaintiff from back of the rear wheel; the rear wheel had gone over plaintiff. They were taking him out on the north side of the wagon; that he (witness) "is not quite sure whether there were three people on the wagon because he got excited;" that the wagon was loaded with some new milk cans piled like steps,

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the row in the center being the highest. They were about four and a half feet high from the bed of the wagon and eight or ten inches higher than the seat on which the driver was sitting. After the accident happened the wagon and team continued on east on Dickson street. The accident happened about 8:30 o'clock in the morning and he saw plaintiff before the wagon came along. Plaintiff was then on the corner of Garrison avenue, playing with some other boys on the sidewalk on the north side of the street. He saw plaintiff when he left to go toward the wagon. Plaintiff and six other boys ran out when they saw the team coming and started to run after the toys; that there were one or two toys sent up before the wagon passed the boys and then the wagon turned in onto Dickson street and some more were thrown out. The wagon was some ten or twelve feet from the corner before plaintiff ran out from the sidewalk, he being on the north side of Dickson street and on the east side of Garrison avenue, on the northeast corner of Garrison and Dickson. On redirect examination this witness testified that he thought there were three persons on the wagon; could not tell how large they were; they were the men or boys who were managing the wagon.

Charles Barnett, sixteen years old, a witness on behalf of plaintiff, testified that at the time plaintiff was injured he (witness) was standing on the steps of his home, which was the corner house on the southeast corner of Dickson and Garrison; saw four or five boys there on the street; saw defendant's wagon coming down Dickson street; that when it was in front of his house the people on the wagon let one of the toys go and it went in the street. A little further down they let out another one of these toys which went to the north of the wagon and then between the front and back wheels. "The boys were out there trying to get this whirligig." Plaintiff got down on his knees and reached under the wagon, which was going slow

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and reached between the two wheels and the back wheel passed over plaintiff's arm. The people on the wagon had thrown out one of these toys before they threw the one out which plaintiff was trying to get when he was injured; that this latter toy did not go up very far, went about fifteen feet and he "guessed" the wind carried it between the two wheels. There were two men on the wagon. Plaintiff had been playing around there for some fifteen minutes. The wagon was going pretty slow and the horses were in a slow walk. On cross-examination this witness repeated that when the wagon passed witness and when the accident happened the horses were going in a walk. There were two boys or men on the seat of the wagon. The seat was on the front part of the wagon and one of these people was driving and one of them was giving out these toys; that the one driving was on the right hand or south side of the seat and the one throwing out the toys was sitting on the north side of the seat. Witness saw plaintiff run out to get the toy and get down on his knees on the north side of the wagon between the front wheel and the rear wheel of the wagon and reach under the wagon and between the wheels to get the toy and while reaching in there the rear wheel on the north side of the wagon ran over his arm. Some man came along the street and called to those in the wagon, "Stop, you have hurt a boy." They immediately stopped. Those on the wagon had been looking ahead of them; did not notice either of them turning around at any time. Plaintiff ran out from the sidewalk from behind the wagon. The team and part of the wagon had gone on by plaintiff. Three boys started out toward the wagon with plaintiff; they all seemed to be in a hurry but witness had not noticed whether they were running or not; they were all together ready to get the toy, but they didn't get down after it.

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Julian Hight, an older brother of plaintiff, testified that he was with plaintiff at the time of the accident. Before it happened he and plaintiff had been playing on the sidewalk on Dickson street. They saw the wagon coming over and one man was winding up the toy which was thrown into the air and they all ran after it. Plaintiff ran after it and it went under the wagon and plaintiff stuck his hand under between the two wheels and went to jerk his hand out when the wheel went over his arm. The wagon was going very slowly. There were two persons on it, one of them driving and the other throwing out the toy. When the toys were thrown out the children ran after them. All the boys ran after them and tried to get them.

On cross-examination this witness testified that they were all playing on the south side of Dickson street; that they started from that side when they ran after the toy; they saw the wagon and ran across the street and stopped and ran toward the west to come up with it; ran across the street in front of the wagon, running on the north side of Dickson street, then turned and ran back on Dickson street; when the toy was thrown out they (the boys) were on the south side of the street and the toy went toward the north and then south under the wagon; the boys all chased it from the south side across to the north side and until it went under the wagon between the front and rear wheels on the north side. The wagon was going all the time. His brother reached under the wagon to get the toy from between the front and rear wheels. There were milk cans on the wagon and banners on the side of it with the name of the brand of bread manufactured by defendant.

Beyond the testimony of the surgeon and of a sister-in-law of plaintiff as to the extent of plaintiff's injury and his suffering, this was all the testimony in chief for plaintiff.

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Defendant at the close of the testimony in chief asked an instruction that under the pleadings and evidence plaintiff was not entitled to recover. This was refused and exceptions saved.

Defendant put on a witness who testified that he lived on Dickson street at the time of the accident; was on the corner of Dickson and Garrison waiting for a car. Defendant's wagon turned the corner to go east on Dickson street; as the wagon came down a hundred feet from the corner a man on it threw out one of these toys. The boys were near the northeast corner of Garrison and Dickson. They ran toward the back of the wagon and one little boy ran ahead of the rest of them, laid on his stomach, reached his arm under the wagon between the first and second wheel and his arm was run over. A street car coming along, witness got on it and as the car caught up to the wagon, witness called to the driver to stop that he had run over a boy. The driver had not known it. There were two people on the wagon on the front seat. The wagon was loaded with milk cans, three rows high, the highest part of the load of cans being in the center. The person driving the team was a young man between twenty-two and tweny-five years old. He was sitting on the right hand side of the wagon to the south of the row of cans that was highest. Witness saw plaintiff before he ran out into the street. He (witness) was then standing at the second door from the corner of Dickson and Garrison on the north. The team was going very slowly; it went about fifty feet after running over plaintiff before it stopped. Plaintiff had left the sidewalk as soon as this advertising toy was thrown out and was about ten feet from the rear end of the wagon before he started to crawl under. On cross-examination this witness testified that he stood four or five minutes waiting for a car; that in the meantime this wagon had gone about a

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hundred or a hundred and fifty feet east of where he was standing; that nobody picked plaintiff up. That after it ran over the plaintiff's arm, the wagon went on about fifty feet, when witness called to the people on the wagon to stop. He did that because the driver had not seen the accident. Plaintiff was about seventy-five feet from witness when he was run over; he was run over about a hundred feet from the corner and witness was about twenty-five feet from the corner, which he "deemed" about seventy-five feet between him and plaintiff, when plaintiff was run over. This is all the evidence offered by defendant.

This is substantially all the testimony in the case as before stated, except that relating to the extent of the injury and the length of confinement of the plaintiff. As counsel make no point on the amount of the verdict, provided one is to be returned at all, it is unnecessary to set out this part of it.

REYNOLDS, P. J. (after stating the facts).—Beyond all question this case was pleaded by plaintiff and tried on the theory that it was one involving what is sometimes called "the turntable," or "attractive nuisance," or "attractive appliance" law.

Referring to that doctrine as applied to cases of injuries to children sustained by playing around or resorting to such appliances, and without any desire to go into a full discussion of it or pedantically to go over its history, it is not improper to say that it is generally conceded to have had its origin in the decision by the Court of Queen's Bench in the case of Lynch v. Nurdin, 1 Adolphus & Ellis (n. s.) 422, also reported 41 E. C. L. 422. It is rather curious to note the various constructions that have been placed upon Lynch v. Nurdin, a decision announced by Lord DENMAN, Chief Justice of the Court of Queen's Bench, in 1841, by the several courts, not only of our country but of Great Britain. Great diversity of opinion has

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been shown as to the exact meaning and scope of that decision. A very full citation and careful analysis of the decisions of the various courts on this much vexed question is in Bottum's Admr. v. Hawks, 84 Vt. 370, 79 Atl. 858. We refer those desirous of going into this question to the opinion of Judge POWERS in that case.

Whatever diversity of opinion there may have been in the courts of Great Britain as to what was really decided in Lynch v. Nurdin, so far as the courts of that country are concerned its interpretation seems to have been definitely settled by the decision of the House of Lords in Cooke v. Midland Great Western Railway of Ireland, L. R. App. Cases (1909), 229, in which latter case Lynch v. Nurdin is expressly approved and applied in a turntable case.

Sioux City & P. R. R. Co. v. Stout, 17 Wall. 657, is the first case in the United States Supreme Court in which the turntable question arose and in which it was recognized in connection with injury to a child, who had played about it. It reached the Supreme Court on error to the circuit court of the district of Nebraska, in which court the case had been tried before Judges DILLON and DUNDY. [See 2 Dillon R. 294, s. c., Fed. Cases, Nos. 13,503 and 13,504, pp. 181-183.] Mr. Justice HUNT, who delivered the opinion of the Supreme Court, an opinion concurred in by all the justices, cites Lynch v. Nurdin as authority in support of the claim of liability for injuries to a child sustained while playing with a turntable. There has been very great discussion of and disagreement as to the Stout case in the decisions of the State courts which followed after that case had been determined, the applicability of Lynch v. Nurdin to a turntable case being sharply challenged. That its principle was to be applied to such cases in the national courts was finally and definitely determined by the Supreme

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Court of the United States in Union Pacific Railroad Co. v. McDonald, 152 U. S. 262.

Turning to the decisions in our own State, it will be found that the rule invoked in the turntable cases has been under consideration by our court as well as by the Supreme Court in several cases. As said by Judge LAMM in Kelly v. Benas, 217 Mo. 1, l. c. 11, 116 S. W. 557, referring to the turntable rule, "It is established in our law, and doubtless on principle ought to be applied (in those jurisdictions asserting the doctrine) to other cases coming strictly within the limits of the doctrine and presenting every earmarking element upon which liability is predicated in the principal case. While this is so, the manifest distress and injustice flowing from unnecessarily extending the doctrine, or loosely applying it to many conceivable cases, has caused those courts accepting it to restrict its application to the narrowest bounds." Citations of numerous cases from our Supreme Court illustrating this follow. [See particularly Witte v. Stifel, 126 Mo. 295, 28 S. W. 89; Barney v. H. & St. J. Ry. Co., 126 Mo. 372, 28 S. W. 1069.] The last reported decision of our Supreme Court on the question to which our attention has been called or which has come under our observation is the case of O'Hara v. Laclede Gas Light Co., 244 Mo. 395, 148 S. W. 884. In this latter case Judge GRAVES, who delivered the opinion of the court, quotes at length from the decision in Brown v. Salt Lake City, 33 Utah 222, l. c. 236, and following, as stating the position of the several courts throughout the country on this rule. We refer to that case and to the quotation from it made by Judge GRAVES. Among other cases cited in Brown v. Salt Lake City is the case of Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74. Following the quotation above mentioned, Judge GRAVES refers for a full review of all the cases of our Supreme Court beginning with Overholt v. Vieths, supra, to the recent case of Kelly v. Benas, supra,

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quoting at length from that case. Discussing the facts in O'Hara v. Laclede Gas Light Company, supra, Judge GRAVES says: "In fact, the turntable cases are anomalous, and it is the practice of the courts to carry their doctrine no further than the previous decisions compel." So it is held by our court in Houck v. Chicago & A. R. Co., 116 Mo. App. 559, l. c. 568, 92 S. W. 738; Marcheck v. Klute, 133 Mo. App. 280, l. c. 291, 113 S. W. 654. The conclusion in the O'Hara case is that the theory of the turntable or attractive nuisance cases was not applicable to such a case as the one then before the court.

It is further said by the court in that case that the plaintiff had constructed her petition on the turntable doctrine of negligence and that so constructing it and submitting the case to the jury on that construction of it, it was unnecessary for the court to concern itself in an endeavor to arrive at the proper construction to be given to the petition; that "by the theory adopted below she (plaintiff) is bound here." This applies to the case now before us. That this case is distinctly presented by the petition and by the evidence as one in which the doctrine of the turntable, attractive nuisance or attractive appliance cases is sought to be invoked, is clear.

Whatever diversity of views may be held by the courts as to the application of the doctrine, or even as to whether it can be sustained at all, it is fairly clear that these factors are held by all the courts recognizing the doctrine as necessary to its application: First, the machinery or appliance, the operation of which was the direct cause of the injury, must have been a dangerous appliance in itself when set in motion, as is a turntable; or it was of a kind liable to become dangerous from the position or condition in which it is left, if set in motion, this latter seeming to fall in with Lynch v. Nurdin. There the dangerous appliance, if we may call it so, was a horse and cart,

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articles neither in themselves nor in combination dangerous. Second, negligence by the defendant in leaving these appliances or things so unguarded, unsecured or unattended, in an open place frequented by children, as to allow of their being put in motion by the children who obtain access to them. It is to be noted that the doctrine is applied only in those cases in which the person injured is a child, one of tender age; on the borderland, as to years, between the irresponsibility of childhood and the responsibility of those of mature years. No case assumes to apply the doctrine to an adult. It is clear from all the cases, that at the very foundation of liability for the injury is the negligence of the defendant. Unless that is proven, the benefit of the rule cannot be invoked. It seems pretty well settled, on analyzing the cases, that the rule is to be invoked, not as a foundation for the liability of the defendant, but to meet the defense of contributory negligence on the part of the plaintiff, a child, injured. It is applied, not as a weapon of attack or as a ground for liability, but as a defense on the part of the plaintiff, a minor, one of tender years, against liability for his own acts of negligence, carelessness or even trespass in going upon the premises where the appliance is maintained. This is made very clear by Bottum's Admr. v. Hawks, supra, even though Judge Powers, speaking for the Supreme Court of Vermont in that case, says that it seems "from a patient consideration of the whole subject in the light of all the cases at hand, that it is impossible to justify the doctrine on common law principles." As is well argued in that case, while suffering a dangerous appliance, which in itself or in its position was a menace to children to remain unguarded, was an act of deliberate carelessness, "it does not necessarily follow that this action will lie. 'Negligence' and 'actionable negligence' are distinguishable terms; carelessness does not always involve liability. Before liability attaches,

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a duty must arise—a duty on the part of the party charged toward the party injured. So," says Judge POWERS, "our discussion begins with the question: Did the defendant owe the intestate a duty, and, if so, was it the duty of active care? If the answer to both branches of this question is affirmative, then, so far as the main question is concerned, liability is stated in this declaration."

In the case at bar we do not think it necessary to place our decision upon the construction of the petition to determine whether it states any cause of action. There is a verdict and judgment in this case, so that if a cause of action is stated, although imperfectly, the defendant having pleaded over after demurrer, there would be no cause for setting aside the verdict or arresting the judgment. That the petition in this case states a cause of action is not challenged. That it distinctly proceeds upon the theory of an attractive appliance and is distinctly bottomed on the doctrine of the turntable cases and that the case was tried upon that theory in the circuit court, admits of no doubt, as we have before remarked. What is claimed by counsel for appellant is a failure of proof of the material averments of the petition.

Returning to a consideration of the evidence in the case, substantially all of which we have set out, we are confronted with the question as to whether that evidence entitled the plaintiff to go to the jury; whether it shows actionable negligence on the part of defendant.

It is averred that plaintiff, a child, saw one of these toys fall under a wagon being driven by employees of defendant and rushed out to obtain it, placing his hand and arm under the wagon to get it. The actionable negligence then here charged is that defendant's employees driving the wagon "did then and there carelessly and negligently cause the hind wheel of said wagon to pass over plaintiff's right

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arm." Again it is averred, that defendants and their employees "in driving said wagon, and throwing said whirligigs into the air, knew, or by the exercise of ordinary care could have known that said toys would attract plaintiff and other children of immature understanding into a place of danger of being injured by said wagon, and cause them to rush to obtain such whirligigs as would fall under the wagon, and that in doing so they were likely to maim or kill such children by running over them," and it is charged "that the act of so driving over the streets and with such heavy wagon, throwing such whirligigs into the air, as aforesaid, and thereby enticing children to struggle to obtain said whirligigs, and to place their hands and arms under the wagon to obtain the same, and driving heedlessly, without noticing a child who had put his hand and arm under the wagon to obtain such whirligig, and passing over and crushing and breaking his arm, was an act of negligence on the part of the defendants." It is furthermore averred in the petition that "it was the purpose of the defendants in causing said large wagon to pass through said Dickson street, and in causing said whirligigs to be thrown into the air, to attract the attention of children thereto, and that said whirligigs were exceedingly attractive to children, and in this way defendants sought to advertise, and did advertise their commodities."

Taking up this last assignment first, it is to be said of it that it is entirely unsustained by any evidence in the case. There is not a syllable or line of testimony tending to show that it was the purpose of defendant to attract the attention of children to the whirligigs, the wagon or the products of the defendant. Nor is there any evidence in the case from which any such purpose may be said to have been proven. It is not to be inferred that the children residing on the streets along which this wagon was driven and the toys turned loose were prospective customers. The

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advertising of the product undoubtedly was intended to reach housekeepers; the toys and the piled up cans, the banner on the wagon, were all parts of an advertising scheme. But it is a far cry to say that by attracting the attention of the children to the toys the attention of the consumers would be attracted to the product. Yet this is the argument that must be relied on to sustain this averment of the petition. It is argued by counsel for appellant that this is a material averment in this petition. Those counsel argue that if the purpose of sending up these whirligigs or toys was to invite the attention of children and to cause them to congregate around the wagon of the defendant for the purpose of increasing the business of defendant, it would seem that defendant owed respondent a very different duty from that which it owed him if he got in the way of the wagon through some impulse of his own and without appellant's knowledge or consent. We think this is a sound argument. We further agree that the burden of proof of this averment was on the plaintiff, respondent here. We hold he has failed to make any proof of it.

Recurring to the other allegations of negligence, careful consideration of the testimony in the case forces us to the conclusion that it fails to establish any actionable negligence on the part of defendant's employees. It appears by the evidence that defendant's employees were driving the team and wagon through the public streets of the city of St. Louis. This they had an undoubted right to do: the right of access to and user of those streets. That the team was being driven at a slow walk, is the unvarying and uncontradicted testimony of every witness in the case, witnesses produced and introduced by plaintiff. Even the plaintiff himself so testified. There were two persons on that wagon in charge of the team and of the appliances, one of them the driver, the other a young man who was turning loose these toys. It is true that

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one of plaintiff's witnesses testifies that he thought he saw three people there, one of them standing in the center of the wagon throwing out these toys. This witness did not state that as a positive fact but stated it as a matter of opinion about which he admitted he was not certain. He is contradicted in this by every other witness of the plaintiff, all of whom were much nearer to the wagon at the time the accident happened than that witness. He was some distance from it and at the time, as he himself testifies, was engaged in opening and examining his mail, which he had in his hand. He says he looked up in a very casual way at the wagon as it passed him. Obviously he paid no particular attention to it or as to who was on it, until he saw his neighbor, the plaintiff, being picked up after the wagon had passed over his arm. He is contradicted in his assertion of there being three people in this wagon by material facts in the case. He says that he thought this third person was standing in the center of the wagon, while the evidence of every other witness in the case is that the center of the wagon, the bed back of the seat, was filled by tin cans which were piled up in the shape of a pyramid or steps, the apex of the pyramid directly over the center of the wagon and above the seat upon which the two occupants in charge of the wagon were seated. We can assume that there were two persons in charge of this wagon and seated at the proper place in the wagon on the seat. The driver was attending to the team, the other person, apparently a boy or young man, in front of this pyramid or pile of tin cans and on the seat, taking these toys from under the seat, winding them up and throwing them into the air. Both were looking to the front. Beyond question these were guilty of no actionable negligence in driving this wagon. They did not know that they had run over anyone until after the wagon had gone some distance and were then told of it by a bystander. It would be a hard rule

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to say that those in charge of a team were required to look behind them to see if any accident was liable to happen after their vehicle had passed. All of our courts which have passed on the question of the duty of those driving a team or an engine, have, so far as we have read, confined the duty of the driver to "looking ahead," according to whether he was advancing or backing with his vehicle. We know of no case laying down any duty upon these to look behind and watch to see what has happened after the vehicle has passed. There is an exception to this rule, in so far as automobiles are concerned. [See section 12, Acts 1911.] Their attention is and must be to the front. They were liable if they ran over any one who was in front or could be seen in front of them, or were going at such speed as to endanger those who might also be using the public ways.

The evidence is without contradiction that these toys were thrown out toward the front of the wagon, or toward the side. If any of them passed behind the wagon they, and any one running after them, were out of the vision of the persons in charge of the wagon and who were sending the toys into the air. Nor can it be said to be an act of negligence on the part of those persons that they did not watch the flight of these toys to see what happened in connection with loosening them on the public street. There is not a particle of evidence tending to show that any boys followed any one of these toys except the boys who followed this particular toy, and which this plaintiff endeavored to secure. Plaintiff and these boys did not go in front of the team. They went behind it. There is evidence that other of these toys were set flying, but as to where they flew, what became of them, is without any evidence. Nor is there any evidence in the case that any children, or any other person for that matter, attempted to secure them or ran out into the street to get hold of them. That the toys were attractive to

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children is beyond question. But conceding that is far from admitting that it proved or even tended to prove that those setting them off had any reason to apprehend that children would follow them under the wagon, especially go between the wheels of the wagon while it was in motion for the purpose of getting one. In fact plaintiff was the only boy who did reach under the wagon. It cannot be held that the law would require those in charge of this wagon, when they threw out one of these toys, to watch its flight, and to stop the team until they saw what had become of it; such requirement would be unreasonable. There was nothing therefore about the manner in which these toys were set free by the employees of defendant, or from the actions of the boys on the street, to warn them that setting the toys free was liable to inflict any injury whatever upon anybody. It was not actionable negligence, as we hold, to set loose these toys.

As every witness testifies, even as this plaintiff himself testifies, when the boy, the plaintiff here, put his arm under the wagon to get hold of this toy, to reach it, he knew that the wagon was moving, that the wheels were turning. He was old enough to know that if he put his arm in front of a moving wheel and left it there, that he was going to be hurt; he was of sufficient discretion to know that; he says he did know it. His excuse is that he thought the wagon had stopped or was going to stop. It is not likely, from the facts in evidence in the case that he thought anything about this. Like any other boy of his age, the chances all are that at the time, if he thought at all, he thought he would be quick enough to get the toy from under the wagon before the wheel would reach him. He took that chance and lost. The doctrine of attractive appliances, of the turntable cases, is therefore inapplicable here and cannot relieve plaintiff of the charge of contributory negligence; cannot be used to put the

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responsibility for the injury, which he undoubtedly sustained, upon this defendant.

Furthermore, the alleged attractiveness of the toy was not the *causa causans* of the injury. That was a remote cause. The immediate cause was plaintiff placing his arm between the front and rear wheels of a moving vehicle; one that he knew was moving and which he had no reason to believe would stop.

For all these reasons, we are of the opinion that plaintiff cannot recover and that the learned trial court erred in sending the case to the jury. The judgment of the circuit court is accordingly reversed. *Nortoni* and *Caulfield, JJ.*, concur.

STATE ex rel. REBECCA RICKART, Relator, v. WILLIAM M. KINSEY, Judge, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 15, 1912. Opinion Filed December 3, 1912.

MANDAMUS: Habeas Corpus: Refusal of Court to Proceed with Trial. A circuit court, issuing a writ of *habeas corpus* and refusing to proceed further under it, will be required by mandamus to proceed with the trial and determination of the issues presented.

Original Proceeding by Mandamus.

WRIT MADE PEREMPTORY.

Frank X. Hiemenz for relator.

Mandamus will lie to compel an inferior court to hear and determine a writ of *habeas corpus*, after the issuance of the writ. Ex parte Malone, 30 Ala. 49; Ex parte Jones, 94 Ala. 34; Ex parte Charleston, 107 Ala. 689; High's Extraordinary Legal Remedies, sec. 266, p. 258.

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J. D. Johnson and *Loomis C. Johnson* for respondent.

REYNOLDS, P. J.—This is an original proceeding to compel respondent, as judge of the circuit court of the city of St. Louis, presiding in Division No. 7 thereof, to hear and proceed to judgment in an application under the *habeas corpus* act, the relator here being the relator in the application for *habeas corpus*, one L. B. Tebbetts and others being the respondents in that proceeding. It appears that on the application of Rebecca Rickart, as guardian of two of the minor children of of Ellen M. Breck, deceased, a writ of *habeas corpus* was issued against Mr. Tebbetts, commanding him to produce these minor children in court and turn them over to the custody of Mrs. Rebecca Rickart. Issuing the writ, when it came on for hearing, the honorable circuit judge refused to proceed further with it, assigning as his ground for refusal that there was pending in the St. Louis Court of Appeals the case of State ex rel. Tebbetts against the Honorable Charles W. Holtcamp, as judge of the probate court of the city of St. Louis, that case having been appealed from the decision of the circuit court, and that until the determination of that case he would not proceed with the hearing or determination of the *habeas corpus*. We have, at this session, by judgment entered, affirmed the action of the circuit court in refusing to set aside that of the probate court, and as the pendency of this cause was the sole ground of refusal of action by the circuit judge, and as that obstacle has been removed by our decision, the objection of the honorable circuit judge to proceed with the *habeas corpus* is removed. Hence we do not consider it necessary to enter into any examination or determination of the points presented by counsel as reasons why the *habeas corpus* matter should not have been suspended notwithstanding the appeal. We assume that the learned circuit

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judge will now proceed to the determination of the *habeas corpus*. To the end, however, that the record may be in proper form, it is ordered that the alternative writ of mandamus heretofore issued in this cause be and it is hereby made absolute. *Nortoni* and *Caulfield, JJ.*, concur.

STATE ex rel. C. F. ELRICK et al., Relators, v. CHARLES CLAFLIN ALLEN, Judge, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 16, 1912. Opinion Filed December 3, 1912.

1. **BILLS OF EXCEPTIONS: Refusal to Sign: Untrue Bill.** A trial judge is justified in refusing to sign a bill of exceptions which is untrue.

2. **MANDAMUS: Bills of Exceptions: Refusal to Sign: General and Specific Reasons in Return: Pleading.** Where a trial judge, in his return to an alternative writ of mandamus, attempts to justify his refusal to sign a bill of exceptions on the ground it was untrue, and then proceeds to specify wherein it was untrue, the appellate court will disregard the general statement that the bill was untrue, which, standing alone, might have defeated the writ, and will determine whether the specific reasons set up justify his refusal, and if they are not sufficient, the writ will be made peremptory.

3. **———: ———: ———: ———: ———: Insufficient Grounds for Refusal: Facts Stated.** In a proceeding by mandamus to compel a trial judge to sign a bill of exceptions setting out the proceedings with reference to the denial of a motion to set aside a default judgment, the respondent averred in his return that he had refused to sign the bill because it was untrue, and then specifically averred that it failed to set out matters that occurred at the time the default was taken and that it included matters which the court would judicially notice. *Held*, that the general statement that the bill was untrue would be disregarded, in view of the fact that respondent specifically set out wherein he deemed it to be untrue; *held, further*, that the specific grounds set out were insufficient to justify respond-

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ent's refusal to sign the bill, since the appeal was prosecuted from the denial of the motion to set aside the default judgment and not from the judgment itself, and hence things that occurred at the time the judgment was rendered were immaterial and should not be incorporated in the bill, and since, also, matters that occurred before the trial judge, of which he took judicial notice, should be set out in the bill, in order that the appellate court may consider them; and hence it is *held* that the writ of mandamus should be made peremptory.

4. **BILLS OF EXCEPTIONS: Contents: Default Judgment: Motion to Set Aside.** Where, on appeal from a justice's court, the judgment of the justice is affirmed because of appellant's failure to prosecute his appeal, and appellant subsequently moves to set aside such judgment and appeals from the denial of this motion, matters that occurred at the time the judgment by default was entered are immaterial to a consideration, on appeal, of the motion to set aside said judgment, and should not be incorporated in the bill of exceptions; and hence the trial judge would not be justified in refusing to sign the bill because such matters were omitted.

5. ———: ———: **Judicial Notice.** Matters that occurred before the trial judge, of which he took judicial notice, should be incorporated in the bill of exceptions in order that the appellate court may consider them; and hence the trial judge would not be justified in refusing to sign the bill because such matters were incorporated in it.

Original Proceeding by Mandamus.

WRIT MADE PEREMPTORY.

Earl M. Pirkey for relator.

H. A. Loevy for respondent.

REYNOLDS, P. J.—On application of relators an alternative writ of mandamus was issued against the Honorable Charles Claflin Allen, one of the judges of the circuit court of the city of St. Louis, requiring him to sign a certain bill of exceptions in a cause in which one C. E. Armstrong was plaintiff and the relator Elrick and one Rankin were defendants, or to show cause on a day named why he should not do so. Ac-

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companying the petition for the writ of mandamus is a copy of the proposed bill of exceptions which had been tendered to the honorable judge of the circuit court within due time and which he had been requested to sign but which, as was averred, he had declined to sign. In due course respondent filed his return to the alternative writ, admitting that he had refused to sign the bill of exceptions which had been tendered. Something like eleven reasons are given for this refusal. The first reason is that he, as judge, had refused to sign the bill of exceptions because it was untrue. Summarizing the reasons which follow this general denial of the truthfulness of the return it appears that the honorable circuit judge refused to sign this bill of exceptions because, first, it omitted to set out matters that had occurred at the time of the trial of the cause in the circuit court, more accurately, at the time when default was taken against the defendants, and because it included matters of which the learned trial judge claimed that the court took judicial notice.

The action which is at the foundation of this controversy was instituted by Armstrong against Elrick and Rankin before a justice of the peace of the city of St. Louis. It appears that on the trial before the justice there was a judgment against the defendants there, from which judgment the defendant Elrick appealed to the circuit court, giving the usual appeal bond, with Kidwell, the other relator here, as surety. This cause, on appeal, was docketed for trial in the circuit court in due course and being called for trial and the appellant Elrick not appearing, as is recited in the judgment, judgment went against him and his surety, it being set out in the judgment that appellant Elrick, although duly called, failed to appear to prosecute his appeal, and that thereupon on motion of plaintiff the judgment of the justice was affirmed. It was thereupon adjudged that the plaintiff recover of

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the defendant Elrick and of Kidwell, the surety on his appeal bond, the amount sued for, with interest and costs and that execution issue therefor. In due time the relators here appeared in the circuit court and filed a motion to set aside the judgment and for a trial thereon, accompanying the motion with affidavits. The motion was resisted, Armstrong, the plaintiff in the cause, filing counter affidavits. All of these are set out in the bill of exceptions which was tendered. After consideration of the motion to set aside the judgment and for trial, it was overruled by the trial court. Whereupon Elrick and his surety against whom the judgment had been rendered in the circuit court prayed for an appeal to this court, paying the docket fee and filing an appeal bond, which was duly approved by the court and the appeal granted, the trial court at the same time granting an extension of time within which to tender a bill of exceptions. Within the time limited by the several extensions the relators tendered their bill of exceptions and asked that it be signed and filed in the cause. The honorable circuit judge declining to sign it, as before stated, the alternative writ was issued out of this court.

As before stated, the first reason assigned by the honorable circuit judge for refusing to sign the bill of exceptions is that it was untrue. This in itself is a sufficient reason, justifying a circuit judge in his refusal to sign a bill of exceptions tendered. If the return had ended with this statement it might have ended the matter. But the learned trial judge, with great frankness and propriety sets out wherein he deems it to be untrue, and sets out the matters omitted, and designates those which he claims are improperly embodied in the bill, and it was conceded at the argument of the cause that this denial of the truth of the bill was a general statement, more in the nature of a conclusion, and that the real reasons for the refusal of the honorable circuit judge to sign the bill of exceptions

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were, first, that it neglected to set out matters which had transpired in his court at the time of the rendition of the judgment by default against the relators, the honorable circuit judge contending that it was necessary to set these matters out in order to present a complete history of the case; second, that it set out matters of which the court took judicial notice. The question for our determination must therefore be, whether these reasons are good and sufficient in law.

Considering the first reason, we are unable to hold it valid. The sole matter presented for the determination of the trial court was the motion of relators to set aside the judgment which had been rendered against them, and it was from the action of the court on this motion that the appeal was taken, not from the judgment which had been rendered in the cause. What occurred at the time the judgment by default was rendered was therefore, for the consideration of this motion, immaterial, and it was unnecessary matter to incorporate in the bill of exceptions seeking to review the action of the trial court on the motion.

The other group of objections to the signing of the bill of exceptions which the honorable circuit judge makes is, that the bill tendered incorporates matters of which it is claimed the trial court took judicial notice. However that might be and however far the trial court might take judicial notice of matters occurring before it, as the case was to be presented to the appellate court, we are unable to see how this latter court can take judicial notice of matters which are not in any manner presented to it and which did not occur before it, but which occurred before the trial court, unless set out in the bill of exceptions.

Our consideration of the whole case is that the reasons given by the honorable circuit judge for his refusal to sign the bill of exceptions tendered, and a copy of which is attached to the petition for the mandamus in this case, are insufficient in law.

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The alternative writ heretofore issued is made final and it is ordered that the Honorable Charles Claflin Allen, as judge of the circuit court of the city of St. Louis, sign the bill of exceptions as prepared and tendered by counsel for relators and as set out in the petition herein, changing however the date of his signing thereof from July, 1911, to the date at which he actually signs it. *Nortoni* and *Caulfield, JJ.*, concur.

GRANITE BITUMINOUS PAVING COMPANY, Respondent, v. PARKVIEW REALTY & IMPROVEMENT COMPANY et al., Appellants.

No. 12563.

St. Louis Court of Appeals, December 3, 1912.

1. **SPECIAL TAXBILLS: Enforcement: Parties Defendant: Prior Incumbrancers: Rights: Mortgages and Deeds of Trust.** Beneficiaries of prior incumbrances upon land hold the same right against the lien of a special taxbill for street improvements as a junior mortgagee holds against a prior mortgagee. The former is a proper, but not a necessary, party to a proceeding to enforce the superior lien by foreclosure. If not made a party, he is not confined to his right to redeem, but may attack the validity of the prior incumbrance in any subsequent proceeding; but his right to redeem before foreclosure sale remains intact, even though he is made a party. [NORTONI, J., dissents.]

2. **STARE DECISIS: Controlling Decisions of Supreme Court: Special Taxbills.** A decision of the Supreme Court, that the lien of a special taxbill for street improvements is superior to prior incumbrances, is a rule of property, binding on all courts of the State in proceedings involving the same question.

3. **SPECIAL TAXBILLS: Enforcement: Parties Defendant: Prior Incumbrancers: Charter of St. Louis.** The owner against whom a special taxbill for street improvements is issued, pursuant to the Charter of the city of St. Louis, and who is the legal owner

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of the property at the time the lien of the taxbill attaches, is the only necessary party defendant in a proceeding to enforce such lien; and a suit instituted against such owner within two years after the taxbill matures, as required by section 25 of article 6 of said Charter, will be sufficient to preserve its lien, although parties who are beneficially interested in other liens on the property, prior in time to the lien of the taxbill, or who have become owners of the property by foreclosure of such other liens, are not made parties defendant.

Held, by NORTONI, J., dissenting, that the beneficiary in a mortgage or deed of trust on the property, the lien of which is prior in time to the lien of the taxbill, is a necessary party defendant, in proceedings to enforce the lien of the taxbill, for the reason he is an "owner" of the property within section 25 of article 6 of said Charter; *held, further*, that the two-year limitation prescribed by said section is not a mere statute of repose, but limits the existence of the lien, so that, unless suit to enforce the lien is instituted against the "owners" within such time, the lien expires and cannot be revivified.

. **STATUTES: Construction.** It is a maxim of judicial procedure that where, in construing a law, two conclusions are equally admissible, the one should be adopted that will best carry out the object which the lawgivers sought to reach.

5. **SPECIAL TAXBILLS: Enforcement: Parties Defendant: Charter of St. Louis: Definition of "Owner."** The term "owner," in its restricted sense, means the legal owner, and, in its wider sense, any person beneficially interested in the property; and, as used in section 25 of article 6 of the Charter of the city of St. Louis, providing that suit for the enforcement of special taxbills shall be brought in the name of the contractor against the *owners* of the land, it should be given the restricted meaning.

Held, by NORTONI, J., dissenting, that the beneficiary in a mortgage or deed of trust on the property, the lien of which is prior in time to the lien of the taxbill, is an "owner" within said Charter provisions, and, as such, is a necessary party defendant in a suit to enforce the taxbill.

6. **———: ———: Parties Defendant: Prior Incumbrancers: Charter of St. Louis: Facts Stated.** At the time of the attaching of the lien of a special taxbill for street improvements, issued pursuant to the Charter of the city of St. Louis, and for a long time prior thereto, certain mortgages, given to secure the holders of various notes or bonds, were outstanding against the property affected by the lien of the taxbill. Suit was brought against the record owner of the property, to enforce the lien of the taxbill, within two years after it matured, as re-

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quired by section 25 of article 6 of said Charter, but the beneficiaries in said mortgage were not made parties defendant. During the pendency of the suit, the property was sold, under foreclosure of the mortgage, and the purchaser was made a party defendant; but, at that time, more than two years had elapsed from the date the taxbill matured. *Held*, that neither the beneficiaries in the mortgage nor the purchaser at the foreclosure sale were necessary parties defendant, and that the judgment enforcing the lien is, therefore, valid as against said purchaser.

Held, by NORTONI, J., dissenting, that the beneficiaries in the mortgage were necessary parties defendant, and that the lien of the taxbill having become extinguished, under the provisions of section 25 of article 6 of said Charter, by reason of such nonjoinder, the judgment enforcing the lien is erroneous, as against said purchaser.

7. ———: ———: ———: **Legal Owner.** For the purpose of determining who is the proper party defendant in a suit to enforce the lien of a special taxbill issued against property for street improvements, the law puts the *onus* on the contractor of ascertaining who is the legal owner of the property, but, prima facie, the owner of record is the legal owner, unless the contractor is aware of an unrecorded conveyance which changes the ownership; the only exception to this rule being change of ownership by descent.

8. **INTEREST: Judgments: Special Taxbills: Charter of St. Louis.** Under Secs. 7179, 7181, R. S. 1909, fixing six per cent as the legal rate of interest, and providing that judgments shall bear that rate of interest, but that judgments on contracts bearing more than six per cent interest shall bear the same rate of interest as fixed by the contracts, a judgment enforcing a special taxbill for street improvements made in the city of St. Louis draws interest at the rate of six per cent per annum, although the Charter of said city provides for eight per cent interest if default be made in the payment of a taxbill, inasmuch as the Charter provision is a provision for penal interest, and is not interest provided by contract, within section 7181.

9. **APPELLATE PRACTICE: Error on Record Proper: Correcting Erroneous Judgment.** The error in a judgment enforcing a special taxbill, providing that the judgment shall bear interest at the rate of eight per cent per annum, instead of six, is an error on the face of the record proper, and the appellate court will notice and correct it, although the appellant's motion for a new trial does not complain of it.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

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JUDGMENT MODIFIED AND AFFIRMED AND CAUSE REMANDED (*with directions*).

CAUSE CERTIFIED TO SUPREME COURT.

Bland & Cave and *Carter, Collins, Jones & Barker* for appellants.

(1) The Charter lien of a taxbill issued July 1, 1905, for work done under an ordinance enacted in February, 1903, and which could under no possible theory have become a lien prior to said February, 1903, has no priority over the lien of deeds of trust executed and recorded in 1902 and 1901. Art. 6, Sec. 24. Charter City of St. Louis; Parker-Washington Company v. Corcoran, 129 S. W. 1031; Cook Case, 101 Ind. 446; Aetna Case, 117 Ind. 251; Pierce Case, 131 Ind. 284; Lovelass, 133 Ind. 600; Pittsburgh Appeal, 40 Pa. 457; Martin v. Greenwood, 27 Pa. Sup. 245; Seattle v. Hill, 14 Wash. 487, 489; O'Niel v. Duringer, 31 N. J. Eq. 510; 27 Cyc. 1176; Hamilton on Special Assessments, Sec. 708; Elliott Roads and Streets, Secs. 543, 547, 599. (2) But admitting such priority, still, in a suit to foreclose the lien of a taxbill, it is necessary to make one whose interest in the land is sought to be subjected to such a lien, a party therto, and this is unquestionably true where, as here, in the case of the *cestui que trustent* in the deeds of trust, he is a record owner. Perkinson v. Meredith, 158 Mo. 464; Jaicks v. Sullivan, 128 Mo. 177; Paving Co. v. Peck, 186 Mo. 520; Corrigan v. Bell, 73 Mo. 53; City v. Bernoudy, 43 Mo. 552; Newman v. City of St. Joseph, 126 Mo. 96; Allen v. McCabe, 93 Mo. 138; Williams v. Hudson, 93 Mo. 524; Stafford v. Fizer, 82 Mo. 393; Smith v. Barrett, 41 Mo. App. 460; Foeny v. Homes, 65 Mo. App. 114; Eyerman v. Scollay, 16 Mo. App. 498; St. Joseph v. Baker, 86 Mo. App. 310; 113 Mo. App. 691. (3) Nor is it sufficient to charge the interest

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of a *cestui que trust* in a deed of trust that the trustee be made a party. Perkinson v. Meredith, supra; Jaicks v. Sullivan, supra; Corrigan v. Bell, supra; St. Louis v. Bernoudy, supra; Williams v. Hudson, supra; Stafford v. Fizer, supra; Keating v. Craig, 73 Mo. 507; McLaran v. Railroad 126 Mo. App. 245. (4) (a) The lien of any taxbill that is not entered satisfied within two years after its maturity, unless proceedings in law shall have been commenced to collect same within that time and shall still be pending, shall be destroyed and of no effect against the land charged therewith. Art. 6, Sec. 25, Charter of St. Louis. (b) And where suit is commenced wthin that period against certain defendants and other defendants are brought in after the expiration of two years no judgment can be rendered against the latter parties or their interest. Forrey v. Holmes, 65 Mo. App. 114; Jaicks v. Sullivan, 128 Mo. 177; Smith v. Barrett, 41 Mo. App. 460; St. Joseph ex rel. v. Baker, 113 Mo. App. 691; St. Joseph v. Baker, 86 Mo. App. 310; Eyerman v. Scollay, supra; Smith v. Boese, 39 Mo. App. 15; Badger L. C. v. Staley, 125 S. W. 779; Parker-Washington Company v. Kemper, 128 S. W. 271. (6) The judgment bearing eight per cent is in conflict with Sec. 7179, R. S. 1909 and erroneous. Gilsonite Roofing and Paving Co. v. Association, 132 S. W. 657.

Sturdevant & Sturdevant and *Charles W. Bates* for respondent.

(1) Special taxes lie general taxes are created in the exercise of the taxing power of the State, and in no other manner. The liens of special and general taxes upon land are identical as to the subject to which the lien attaches, and the scope and effect of the lien. In both instances the lien of the tax attaches to the land itself to the *res,* and binds all interests in the land and is superior to all. When the land taxed is subject to

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an existing mortgage, or other incumbrance resting upon contract, the lien of the tax supersedes such incumbrance, and becomes senior thereto; and in such cases the lien of the junior lienholder is a lien only upon the equity of redemption of the owner of the land, which gives him the right to redeem and protect himself against the paramount lien of the tax. On the foreclosure of such tax lien, the owner of the land is an indispensable party to a valid judgment foreclosing his equity of redemption; the plaintiff may likewise foreclose and bar all equities of redemption of the junior incumbrancer by making him a party, also, to the foreclosure; or, if he elects, may waive the right to bar and foreclose such equity of redemption of the junior lienholder by omitting him from the suit, in which event he may redeem from the purchaser under the foreclosure of the tax lien. And when the senior tax lien is foreclosed in such manner and the land sold to satisfy such lien, the purchaser at such sale acquires a fee simple title to the land. Keating v. Craig, 73 Mo. 507; Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138. Land & Lumber Co. v. Bippins, 200 Mo. 688; Engineering & Const. Co. v. Ice Rink Co., —— S. W. —— (2) Junior lienholders are not necessary parties to a suit foreclosing the lien of a special taxbill. Valentine v. Havener, 20 Mo. 133; Talbott v. Roe, 171 Mo. 432; Jones on Mortgages, 6 Ed., par. 1395-6; Wiltse, Mortg. Foreclosure, pp. 190 and 191; Haines v. Beach, 3 John. Ch. 459; Tug River Coal, etc. v. Brigel, 86 Fed. 818; Davis v. Trust Co., 152 U. S. 590; Corrigan v. Bell, 73 Mo. 53; Allen v. McCabe, 93 Mo. 138; Williams v. Hudson, 93 Mo. 524; 27 Cyc. 1563 and notes; Page and Jones on Taxation by Assessment, secs. 1123-1225. (3) The right of a junior lienholder, who was not a party to the suit, foreclosing a senior lien, is a right to redeem, and that only; and this is, of course, trus as

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to all bondholders and beneficiaries for whose benefit the junior lien is held. Wiltse on Mortg. Foreclosure, pp. 190, 191, par. 160; Jones on Mortg., secs. 1203, 1396, 1426; Stafford v. Fizer, 82 Mo. 393; Rothenberger v. Garrett, 224 Mo. 197; Williams v. Hudson, 93 Mo. 524; Allen v. McCabe, 93 Mo. 138; Keating v. Craig, 73 Mo. 509. (4) Under the Charter of St. Louis and adjudications thereon the owner of the property to which the lien of the taxbill attaches is a necessary party, that is, a wholly indispensable party, to a suit foreclosing such lien, and unless such owner is a party to the suit any judgment therein establishing a lien is void. Barnett, etc. v. Board of Public Schools, 61 Mo. App. 542; Perkinson v. Meredith, 158 Mo. 464; City of St. Louis v. Bernoudy, 43 Mo. 552; Jacks v. Sullivan, 128 Mo. 177. (5) On the other hand, it is equally well settled by adjudication that the beneficiary in a deed of trust, or mortgage, is not a necessary party to a suit foreclosing the lien of a special taxbill. Upon this it follows that such trustee or mortgagee is, therefore, not an owner within the meaning and purpose of that term as used in our Charter and the law making owners necessary parties to such foreclosure. City of St. Louis v. Bernoudy, 43 Mo. 552; Olmstead v. Tarsney, 69 Mo. 396; Keating v. Craig, 73 Mo. 507; Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138. (6) Where the judgment rendered is for the correct amount of principal and interest due at the time of its rendition, the fact that such judgment provides that it shall bear a higher rate of interest than the law permits from the date of its rendition is not such an error as would justify reversal. The excessive interest so provided for can be remitted by plaintiff or corrected by the court and the judgment affirmed for the correct rate of interest. 3 Cyc. 434; State v. Hope, 121 Mo. 34; Kimes v. St. Louis, 85 Mo. 611; Franklin v. Haynes, 119 Mo. 566.

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ON MOTION FOR REHEARING.

R. E. ROMBAUER, Special Judge.—This is a suit on a special taxbill issued in pursuance of the Charter provisions of the city of St. Louis relating to street improvements. The suit was tried by the circuit court without the intervention of a jury, and resulted in a judgment for plaintiff in the sum of $1615.25, with interest at the rate of eight per centum per annum from date, charging the lot against which said taxbill was issued with the amount of the judgment, interest and costs, and ordering the sheriff of the city of St. Louis to sell the same to satisfy the amount thus found to be due.

From this judgment all the defendants appealed, assigning for error that the judgment was against the law and the evidence, was excessive, as far as the interest was concerned, and was erroneous because the taxbill was barred by limitation, as far as all defendants were concerned, save the Parkview Realty and Improvement Co., who had ceased to be an owner, its title having been divested prior to the trial of the case by foreclosure proceedings.

The appeal was heard at the last term of this court and resulted in a reversal of the judgment. Upon a motion for rehearing filed by respondent, some doubts were entertained by the court as to the correctness of that ruling, and in view of the grave importance of the question to the municipality as well as to individual owners of real property within the city, full argument on the motion for rehearing was ordered at the present term. One of the judges being disqualified to sit, the undersigned was, with the consent of all parties, appointed special judge.

In order to pass intelligently upon the contention of the defendants, that the judgment is erroneous, for reasons hereinabove stated, it is necessary to set out

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certain provisions of the Charter of the city of St. Louis relating to street improvement.

Section 14 of article 6 levies the tax against the property benefited.

Section 24 directs the issuance of the taxbill but does not require that any one be named therein as owner.

Section 25 provides that the taxbills shall be a lien on the property charged therewith, but does not impose any personal liability on the owner. This section further provides that suit for the enforcement of the taxbills shall be brought in the name of the contractor against the owners of the land, and that such taxbills shall be barred by limitation after two years from their maturity, unless proceedings in law shall have been commenced to collect the same within two years from their maturity.

It was a mooted question in this state at one time whether special taxes assessed against specified property for street improvements stood, as to their superior lien over prior incumbrances, upon the same footing as general taxes assessed by the state. This question has, since the trial of the cause in the lower court, been set at rest by the opinion of the Supreme Court in the case of the Morey Engineering & Construction Company against the St. Louis Artificial Ice Rink Co., 242 Mo. 241, 146 S. W. Rep. 1142, which decides that question in the affirmative. The further question, however, which is the vital question in this case—namely, whether prior incumbrancers of the property charged with the special tax lien are necessary parties to a suit brought by the contractor against the owner, not only for the purpose of subordinating their lien to the superior lien of the special taxbill, but also for the purpose of keeping alive the lien of the special taxbill for more than two years after its maturity—is a question which has not been decided by that case, and is one which must be determined by

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the rules of law defining the respective rights of the holders of senior and junior incumbrances in proceedings brought to foreclose the senior lien.

The Supreme Court, in the Morey Engineering case, supra, quoting from Barber v. St. Joseph, 183 Mo. 451, holds that "proceedings to enforce special taxbills, are in the nature of *proceedings in rem*, and compulsory payment of the judgment can only be made by a sale of the assessed property," and, quoting from the case of Keating v. Craig, 78 Mo. 507, further holds that the lien of a special taxbill, like the lien of general taxes, is superior to any incumbrance with which the owner may charge the land. If this be so, beneficiaries of prior incumbrances upon the land hold the same right against the lien of a special taxbill as the junior mortgagee holds against the prior mortgagee. The former is a proper party to any proceeding to enforce the superior lien by foreclosure, but he is not a necessary party. If not made a party, he is not confined to his right to redeem, but may attack the validity of the prior incumbrance, in any subsequent proceeding, because he had no day in court. To use a terse definition of his rights, his right of entry is gone, but his right of action remains. His right to redeem *before foreclosure sale* remains intact, even if he is made a party to the foreclosure proceedings.

Having thus stated the general rules of law applicable to a case stated, we shall apply them to the uncontroverted facts in this case.

The special taxbill sued upon was issued to the plaintiff July 1, 1905. At that time there were the following *recorded* liens by deed on the property: One dated April 30, 1901, in favor of Isaac H. Orr, trustee, to secure certain notes; one dated July 1, 1902, to the Lincoln Trust Company, to secure certain *bonds;* and one dated August 1, 1902, to the Lincoln Trust Company, to secure certain *other bonds.*

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The Parkview Realty & Improvement Company was the legal owner of the property when these two last mortgages were made and recorded, and was also the legal owner of the property when the taxbill in question was issued. On July 19, 1905, notice of the issue of this taxbill was served on the Parkview Realty & Improvement Company, and on June 26, 1907, and within two years from the maturity of said taxbill, suit was brought against the Parkview Realty & Improvement Company, Isaac H. Orr, trustee in the mortgage of April 30, 1901, and the Lincoln Trust Company, trustee in the two mortgages of July 1 and August 1, 1902. None of the beneficiaries in these mortgages were made parties defendant.

These mortgages are not set out in the abstract of the evidence of the appellant, nor does it appear that they were ever offered in evidence. The plaintiff's amended petition, however, on which the cause was tried, stated that the mortgage of July 1, 1902, of the Parkview Realty & Improvement Company to the Lincoln Trust Company, as trustee for bondholders, secured 5000 bonds, and the mortgage of August 1, 1902 between the same parties secured 2000 bonds, and that the Nina Realty Company became the purchaser of the property charged with the plaintiff's lien, on the foreclosure sale of these mortgages, subsequent to the issue to plaintiff of the taxbill in question. While these allegations are denied by the defendants' answers, they are admitted to be true in the briefs of counsel, and we have taken them to be true; otherwise, we cannot see how the defendants could have any standing in this court.

All of the defendants, except the Parkview Realty & Improvement Company, in their separate answers set up the fact that the taxbill, owing to the two years' limitation of the lien contained in section 25 of the Charter of the city of St. Louis, hereinabove set out, has become invalid. During the pendency of the

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suit, the Nina Realty Company became purchaser of the property, under foreclosure of the mortgages to the Lincoln Trust Company, and it was made a party defendant to the suit by amended petition on November 2, 1908, when more than two years had elapsed from and after the maturity of the taxbill.

We may state at the outset that it is next to impossible to reconcile the various conflicting decisions of the appellate courts in this State on the question whether, in proceedings for enforcement of special taxbills, incumbrancers prior in time and record are *necessary* parties to enforce the bill against the property. Prior to the decision in the Morey Engineering & Construction Company case, supra, the same conflict existed on the question as to whether the lien of a mortgage, prior in time and record to the issue of a special taxbill, constituted a superior or inferior lien on the property to the lien of a taxbill. When that case decided that the lien of the taxbill was superior, it necessarily decided, by analogy to the rights of other prior and subsequent lienors, that the incumbrancer whose lien was subordinate was not a *necessary* party to the proceeding. This decision establishes a rule of property, which, on well-settled principles, is binding on all courts of the State in proceedings involving the same question. It logically follows from the foregoing that, under the recent decision of the Supreme Court, the owner against whom the bill has been issued and who was the legal owner at the time the lien of the taxbill attached is the only necessary party defendant in proceedings for the enforcement of its lien, and if the suit is instituted againsst him within two years after maturity of the bill, it is sufficient to preserve the lien of the bill, although parties beneficially interested in liens on the property, prior in time, or becoming owners by the foreclosure of such liens, may never be made parties defendant.

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There is another consideration equally potent which leads to the same conclusion. It is a maxim of judicial procedure, that where two conclusions are equally admissible, in construing a law, the one should be adopted by the court which will best carry out the object which the lawgivers sought to reach. The term "owner," in its restricted sense, means the legal owner, and, in its wider sense, any person beneficially interested in the property. The city Charter, in providing for the pay of the contractor in special taxbills, must have used the term owner in its more restricted sense, since, otherwise, the lien of the special taxbill, in preference to existing liens created by deed, would have become practically unenforceable and furnish the contractor no security whatever. Of this, the facts disclosed by the record in this case furnish the fairest illustration. The two trust deeds held by the Lincoln Trust Company, as above seen, secured seven thousand bonds. Nothing to the contrary appearing in the record, we must assume that these bonds, as all other bonds of a similar character, were negotiable by delivery, and may have been negotiated to seven thousand different persons, each of whom, under the rule well established in this State, would have become a *pro tanto* beneficial owner in the property charged by the tax lien and, under the defendants' contention of the proper construction of the law, a necessary party defendant to the foreclosure of plaintiff's tax lien. Yet the plaintiff could not have ascertained by the greatest diligence the name of such parties, since the law requires no registry of these transfers. On the other hand, the contractor's claim is based upon records accessible to all interested in the property, from its inception to the date of the issue of the taxbill. The work performed by him is bound to be performed in the immediate vicinity of the property to be charged with the tax lien, and there is nothing to prevent those

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beneficially interested from informing themselves of its character and extent.

The law puts the *onus* on the contractor to ascertain who is the legal owner of the property benefited when the taxbill against it is issued, and who, hence, is a necessary party to a suit for its enforcement against the property. Prima facie, the owner of record is the legal owner, unless the contractor is aware of an unrecorded conveyance changing the ownership. [Vance v. Corrigan, 78 Mo. 94.] The exception to this rule is ownership by descent, because the contractor can always ascertain, by reasonable inquiry, whether the apparent record owner is living or dead, and if dead who his heirs are. The case of Jaicks v. Sullivan, 128 Mo. l. c. 186, 30 S. W. 890, furnishes an apt illustration. In that case Richard L. Sullivan was sued as owner four years after his death. The plaintiff sought to amend his petition by bringing in his widow and heirs after the two-year limitation had barred the taxbill. The Supreme Court held that the lien of the taxbill had expired, because the suit against a dead man could not be considered the institution of a suit against the owner, on any principle.

The point has been made upon the argument that the taxbill is, under the Charter, prima facie evidence only against the owner, and hence if the other defendants, other than the Parkview Realty Company, were not owners within the purview of the Charter provisions, no judgment could be rendered affecting their interests, upon the evidence of the taxbill alone. That objection is not sustained by the record, which shows that the plaintiff offered in evidence the ordinance and contract under which work was done, and proved by its general manager that the plaintiff had performed the work called for by the contract.

The foregoing considerations lead to the conclusion that the judgment of the court was correct, and should be affirmed, unless the defendants' con-

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tention, that it is excessive in interest, is borne out by the record proper.

An argument was pressed upon us that the judgment is excessive, as far as part of the interest is concerned. It suffices to say, in disposing of this objection, that the judgment is not challenged on that ground by the motion for new trial.

Section 7179 of the Revised Statutes provides that creditors shall receive interest at the rate of six per cent per annum, when no other rate *is agreed upon* for all moneys after they become due, and demand of payment is made. Section 7181 provides that all judgments for money shall bear six per cent interest per annum until satisfaction be made by payment, and that judgments upon contracts bearing more than six per cent interest shall bear the same interest as borne by such contracts. The eight per cent interest which the Charter provides, if default be made in the payment of a taxbill, is penal interest and not one provided by contract, hence the judgment in this case, as far as it recites that the judgment rendered shall bear eight per cent interest, is excessive to that extent. This error appears by the record entry of the judgment and we are bound to take cognizance of it although the defendants' motion for new trial does not complain of it, because the judgment, to that extent, is a judgment against the law.

It is therefore ordered that the motion for rehearing be sustained, and that so much of the judgment entry as contains the words "with interest at the rate of eight per cent per annum from the date of judgment until paid" be stricken from the record, and that the judgment as thus amended be affirmed, and that the cause be remanded to the trial court to enter up judgment in conformity with this opinion.

Reynolds, P. J., concurs, *Caulfield, J.*, not sitting. *Nortoni, J.*, dissents in a separate opinion and asks that the case be certified to the Supreme Court, deem-

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ing the majority opinion in conflict with decisions of the Supreme Court and the Kansas City Court of Appeals referred to in his opinion.

It is accordingly ordered by the court that this case be certified to the Supreme Court.

DISSENTING OPINION.

NORTONI, J.—This is a suit on a special taxbill issued in accordance with the Charter provisions of the city of St. Louis, in compensation for street improvement. Plaintiff prevailed in the suit, and the court gave judgment establishing the lien of the taxbill against the lot of defendant Nina Realty Company in the amount of $1600.23, and interest thereon.

There are several defendants, and all of them appeal from this judgment, but the Nina Realty Company alone, as owner of the lot on which the lien is enforced, is the substantial party in interest. The other defendants are prior owners of the property and trustees in certain deeds of trust thereon, and it will be unnecessary to set them forth here, as they are without any beneficial interest in the property and the judgment is in no sense a personal one against them. At the time the judgment was entered, the lot on which the lien of the taxbill is sought to be established was owned by defendant Nina Realty Company, who succeeded to the title of the Parkview Realty & Improvement Company by virtue of the foreclosure of certain deeds of trust thereon, under which the Nina Realty Company purchased.

The lot of ground involved is parcel of City Block No. 3878, fronting 405.17 feet on Union boulevard in the city of St. Louis. Plaintiff contractor reconstructed Union boulevard adjacent thereto, in accordance with an ordinance of and under a contract with the city of St. Louis, to that end. At the time of the improvement and the issue of the taxbill there-

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for, the lot was owned by the Parkview Realty & Improvement Company, a corporation, subject, however, to two deeds of trust then outstanding thereon. The first of these deeds of trust was executed on July 1, 1902 by the Parkview Realty & Improvement Company, owner, to the Lincoln Trust Company, trustee, to secure certain bonds. The second of such deeds of trust was executed on August 1, 1902 to the Lincoln Trust Company, trustee, to secure certain other bonds, and both of such deeds were duly recorded about the time of their execution. While these deeds of trust were in force and the indebtedness evinced by the bonds therein described was subsisting and unpaid, the city provided by ordinance for the reconstruction of Union boulevard. This ordinance appears to have been passed in February, 1903, and the contract for such reconstruction work was duly let thereunder to plaintiff. Plaintiff performed the work in accordance with the ordinance and contract, and on July 1, 1905 the taxbill sued on was issued to him therefor. Thereafter, on July 19, 1905, notice of the issuance of the taxbill was duly served by the city marshal on the defendant, Parkview Realty & Improvement Company, owner of the fee, but on no other defendant. As originally issued, the taxbill was payable in installments, but upon the failure of the owner of the property to pay the first installment when due, plaintiff exercised its option under the city Charter and declared all installments thereof due and payable. Under the provision of the Charter, the first installment of the taxbill became due thirty days after notice thereof was served on the owner—that is, on August 19, 1905—and subsequent installments became due immediately, likewise, because of the owner's failure to pay the first installment. Thereafter, on June 20, 1907, and within two years from the maturity of the taxbill, August 19, 1905, plaintiff instituted this suit, to the end of establishing and enforcing the lien there-

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of against defendant Parkview Realty & Improvement Company, owner, and the trustee in the two deeds of trust, but omitted to make the beneficiaries in such deeds of trust parties thereto. Subsequently and after the expiration of more than two years from maturity of the taxbill, the property was sold at trustee's sale under the two deeds of trust above mentioned, and the Nina Realty Company became the purchaser thereof. Such sales under the two deeds of trust were had on November 2, 1908, and it was on that day the Nina Realty Company succeeded to the title of the prior owner, Parkview Realty & Improvement Company, through its purchase at the trustee's sale. The Nina Realty Company, having thus become owner of the fee during the pendency of the suit, was made a party defendant thereto on November 20, 1908. By filing an amended petition on that date, plaintiff set forth the trustee's sales and the fact that the Nina Realty Company had purchased the lot thereunder, made that company a defendant, and prayed that its interests as owner of the property should be subject to the lien of the taxbill in suit.

Among other things, Section 25, Art. VI, of the city Charter provides the lien of any taxbill that is not entered satisfied within two years after its maturity, unless proceedings in law shall have been commenced to collect the same within that time and shall still be pending, shall be destroyed and of no effect against the land charged therewith. In view of this provision of the Charter, the defendant Nina Realty Company interposed its answer to the effect that the lien of the taxbill had expired and was unenforceable against its interests in the property, for the reason that no suit had been instituted thereon within two years after maturity of the bill against the beneficiaries in the deed of trust under which it purchased. Though the Parkview Realty & Improvement Company, owner at the time, was sued within the two-

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year period, the case concedes that the beneficiaries in the two deeds of trust under which defendant Nina Realty Company purchased were not made parties thereto at any time. Indeed, the first move made toward bringing the interests of the beneficiaries before the court was the amended petition filed on November 20, 1908, adding the Nina Realty Company, who succeeded to their rights, as a defendant, and this was long after the expiration of the two-year period prescribed in the Charter, for that period commenced to run when the taxbill matured, on August 19, 1905, and terminated August 19, 1907. Notwithstanding all of this, the court gave judgment for plaintiff, establishing and enforcing the lien of the taxbill against the lot of of ground described and the interests of both the Parkview Realty & Improvement Company and the Nina Realty Company therein, as though it were unnecessary to include the beneficiaries in the deeds of trust in a suit for the enforcement of the taxbill within the two-year period prescribed, to charge them or their successors as owners of the property with the consequences of the lien.

Obviously, error lies in this judgment, for it involves and affirms the idea that one's rights may be concluded as though a valid claim existed against him or his property without having his day in court until long after such claim had become extinguished of its own force. By Section 25, Art. VI of the Charter, it is provided the taxbill shall become a lien upon the property charged therein and may be collected of the owner of the land and in the name of and by the contractor, as any other claim, in any court of competent jurisdiction. From this, it appears that the lien is to be enforced against the land in the name of the owner thereof and, by subsequent provision of the same section, the lien of the taxbill, it is declared, "shall be destroyed and of no effect against the land charged therewith," unless proceedings shall have

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been commenced to collect the same within two years from the maturity of the bill and still be pending. Therefore, the proceedings must be commenced on the taxbill and against the owner of the land within such two-year period in order to preserve and establish the lien, or, otherwise, it is destroyed and extinguished perforce of the very words that gave it life. The authorities are abundant and of one accord to the effect that the suit must be instituted against the owner within the two-year period prescribed, as will appear by reference to the following cases: The case of Eyermann v. Scollay, 16 Mo. App. 498, declares and affirms the rule under the St. Louis Charter; and the following are to the same effect with respect to the Charter of Kansas City: Smith v. Barrett, 41 Mo. App. 460; Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890; Smith v. Boese, 39 Mo. App. 15; Forrey v. Holmes, 65 Mo. App. 114; Parker-Washington v. Kemper, 143 Mo. App. 244, 128 S. W. 271. For rulings to the same effect under the St. Joseph Charter, see St. Joseph v. Baker, 86 Mo. App. 310; St. Joseph v. Baker, 113 Mo. App. 691, 88 S. W. 1122. The doctrine declared by all of the cases is, that the two-year period prescribed after which the lien is to terminate, is not a mere statute of repose to bar actions, but is rather a limit to the existence of the lien and, therefore, unless the suit is instituted against the owner within that time, such lien expires and it may not be revived and enforced against the interests of the owner in the land. [Smith v. Barrett, 41 Mo. App. 460.]

But, it is said, though such be true, the present suit was instituted against the Parkview Realty & Improvement Company, owner, within the two-year period, and that will suffice to establish the lien against the derivative title of the Nina Realty Company, though the beneficiaries in the deeds of trust were not made parties; for, it is said, such beneficiaries possess nothing more, as against this plaintiff lienor,

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than the right to redeem therefrom. There can be no doubt that the lien of a subsequent special taxbill duly established prevails over the lien of a prior mortgage or deed of trust and becomes senior thereto. Such is the effect of the recent decision of the Supreme Court in Morey Engineering, etc. Co. v. St. Louis Artificial Ice, etc. Co., 242 Mo. 241, 146 S. W. 1142. This is undoubtedly the rule where both the owner of the land and the beneficiaries in the mortgage are made parties to the suit prior to the expiration of the lien, for, in the case last above cited, all parties in interest were before the court. See, also, to the same effect, Keating v. Craig, 73 Mo. 507, where both the owner and the mortgagee were parties to the suit to enforce the lien of the taxbill. But though it be the rule that the lien of the subsequent taxbill becomes senior to the lien of the prior mortgage, which is remitted to the position of a junior lien, when all parties in interest are before the court, it is the rule, too, that the rights of the beneficiaries in the mortgage are not concluded by the judgment unless they are made parties to the suit. For a judgment to this effect on a taxbill, see Forrey v. Holmes, 65 Mo. App. 114. As to such beneficiaries who have been omitted from the suit to foreclose the State's lien for taxes, the Supreme Court has, in a number of cases, affirmed that, though title passed by the execution sale, their right to redeem was still available, as will appear by reference to Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472; Corrigan v. Bell, 73 Mo. 53; Allen v. McCabe, 93 Mo. 138, 6 S. W. 62.

Considering the thought reflected throughout all of these authorities, it is obvious that the beneficiary in the deed of trust or mortgage is required to be made a party to the suit, for the reason that he is an owner, within the sense of that term as employed in the Charter provision and as employed in the statute

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with respect to general taxes levied in behalf of the State. Some of the cases put the rule expressly on the ground that the beneficiary is an owner. [See Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472.] Furthermore, the Supreme Court, in the recent case of Morey Engineering, etc. Co. v. St. Louis Artificial Ice, etc. Co., 242 Mo. 241, 146 S. W. 1142, in construing the St. Louis Charter, declared the beneficiary in the deed of trust an owner within the sense of that term, to the end of raising the lien of the taxbill from the position of the junior, where it otherwise lay, to that of senior lien over a mortgage prior thereto in point of time. To the end of evincing that the Charter contemplated the lien of the taxbill should prevail over the rights of a prior mortgage, the Supreme Court quoted from section 25 of the Charter as follows: "Said taxbills shall be and become a lien upon the property charged therewith, and may be collected of the owner of the land and in the name of and by the contractor as any other claim in any court of competent jurisdiction." Touching the words thus quoted, the court says, "Construed in the light of the case last cited, this means that the tax is a lien upon the property, to be enforced by a proceeding *in rem* against the property. And, as ruled above, the word 'owner' includes incumbrancers." If, then, the beneficiary in the deed of trust is to be regarded as an owner of the property for the purpose of postponing the lien of his prior mortgage to the lien of the subsequent taxbill, it would seem that he should be regarded as an owner in whose favor the requirement to institute suit within the two-year period, in order to preserve the lien, obtains. On a like question the Kansas City Court of Appeals, under the Charter of that city, declared that, unless the beneficiary in the mortgage was made a party to the suit within the two-year period, the lien as to his interests

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amounted to naught, or, in other words, had expired. [See Forrey v. Holmes, 65 Mo. App. 114.]

But it is argued that the junior lienor is never a necessary party to a proceeding for the enforcement of the senior lien and that a valid judgment may be had against the *res*, enforcing the lien, though the junior lienor is not a party, but subject, however, to his right to redeem. The argument is obviously sound in those cases where the lien is a continuing one and so comprehensive by the terms of the statutes as to include all interest in the land in whosoever name it may be. The cases of Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138, 6 S. W. 62, and numerous other authorities declare the rule where the lien of the State for taxes has been enforced. In the argument advancing this proposition it is said the junior lienor, the holder of the mortgage here, at best has a lien only on the equity of redemption, or a right to redeem from the prior lien of the taxbill, and that this continues and may be availed of to the very day of sale under the tax judgment; that though defendant Nina Realty Company was not made a party until after the two years had expired, and the beneficiaries in the mortgages, to whose rights it succeeded, were never made parties at all, its right to redeem is still open and this defendant has been given its day in court with respect thereto, for it may redeem even after the judgment is affirmed and at any time before the property is sold in execution thereunder. Obviously this argument assumes a subsisting lien against the interests of the Nina Realty Company from which a redemption may be made. If the lien continued to exist as in the tax cases, and obtained upon the realty without regard to the ownership, the argument would be persuasive, indeed. But here, the lien of the taxbill expired before it was ever asserted, as the Charter requires, against the beneficiaries in the mortgages, or

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the Nina Realty Company, which succeeded to their rights, and, furthermore, the lien of the taxbill does not obtain against the land without regard to the ownership.

The general taxes in favor of the State are declared by section 11385, Revised Statutes 1909, to obtain against the land "no matter who is the owner nor in whose name it was assessed." And the lien with respect to such taxes obtains accordingly there—that is, on every interest in the land. It is true that the owner of the land must be made a party to the tax suit for the purpose of enforcing the lien of the State, to the end of conferring the jurisdiction over the *res*, but the tax itself is affixed against the land as a matter of law without regard to the owner thereof. Such is not true as to a taxbill representing special assessments as for benefits because of improvements made, for unless the improvements are made, no tax can obtain, and that such improvements were made is a fact to be proved as a basis for the lien. Special taxbills become a lien upon the property and may be collected of the owner of the land, it is true; but, to this end, proof is required against the interest of the owner as a condition precedent to affixing the lien upon his interest in the land. This proof, according to section 25 of the Charter, may be made by the taxbill itself, which is sufficient prima facie evidence "of the liability of the person therein named as the owner of the land charged with such bill to pay the same." The taxbill here involved names the Parkview Realty & Improvement Company as the owner of the land and in no way refers to the beneficiaries in the mortgages. Obviously, then, the bill itself is sufficient to evince the right of a lien against only the Parkview Realty & Improvement Company. In the sense of the Charter, as before pointed out, the beneficiaries in the mortgages are regarded as owners of the property, too, and it is essential, when others than those named in

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the taxbill appear to be owners, that proof *aliunde* the bill be made, in order to affect the rights of such owners not named therein. [See Farrell v. Rammelkamp, 64 Mo. App. 425; McCormick v. Clopton, 150 Mo. App. 129, 130 S. W. 122.]

That the taxbill is not prima facie evidence of the right to the lien against a mortgagee not named therein has been expressly decided, as will appear by reference to Kansas City to the use, etc. v. American Surety Co., 71 Mo. App. 315. Obviously the Charter intends that every person interested as owner in the property sought to be subjected to the lien of the taxbill shall have a right to defend against the assertion of such lien, and most assuredly the assertion of the lien should be made while the right to it continues to exist and not after it dies, for then defense would be unnecessary. From these considerations alone, it would seem that the rule which prevails as to the right of the junior incumbrancer to redeem from the general tax lien and, except for that, a judgment to which he is not a party concludes him, is without force here, for unless this lien is established by evidence *aliunde* the taxbill, no lien whatever obtains against the rights of such owner as the Nina Realty Company, whereas in the case of the lien for general taxes it comprehends the whole estate and every interest in the land, without regard to the matter of ownership whatever, and obtains against both prior and subsequent incumbrancers at all hazards. In the case of the special taxbill, the lien obtains against the owners and their interests in the land only by virtue of its being established against their interest in the land by proof, and not because it comprehends such interests whether or no, as a matter of law. Unless the lien is asserted within the two-year period and subsequently established, there is naught from which redemption should be made.

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It seems to me the opinion of the court in this case overlooks the fact that there is no lien here until established, and treats the matter as though there were a subsisting lien as in the case of general taxes or in the case of a mortgage, both of which liens obtain without any proof whatever. In this cause, instead of there being a lien upon the land, there exists only a right to establish a lien which attaches provided competent proof is made against the owner within two years. If the mortgagee is an owner, as declared in Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241, 146 S. W. 1142, then such mortgagee should be sued within the two years limitation prescribed by the Charter in favor of an owner.

For the reasons given above, I respectfully dissent. I deem the judgment of the court to be in conflict with that of the Supreme Court in the case last cited, in that it denies to the mortgagee the right of an owner to be sued within two years, as prescribed by the Charter. Furthermore, the judgment of the court in this case is in conflict with the judgment of the Kansas City Court of Appeals in the case of Forrey v. Holmes et al., 65 Mo. App. 114, which is directly in point to the effect that unless the mortgagee is sued within two years the right to establish a lien against his interests expires.

Because I deem the judgment to be in conflict with that given in the two cases last above cited, I request that the cause be certified to the Supreme Court for final determination.

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GRANITE BITUMINOUS PAVING COMPANY, Respondent, v. PARKVIEW REALTY & IMPROVEMENT COMPANY et al., Appellants.

No. 12561.

St. Louis Court of Appeals, December 3, 1912.

Granite Bituminous Paving Company v. Parkview Realty and Improvement Company et al. (No. 12563), *ante*, followed. NORTONI, J., dissents.

Appeal from St. Louis Circuit Court.—*Hon. Eugene McQuillin*, Judge.

JUDGMENT MODIFIED AND AFFIRMED AND CAUSE REMANDED (*with directions*).

Cause certified to Supreme Court.

Bland & Cave and *Carter, Collins, Jones & Barker* for appellants.

Sturdevant & Sturdevant and *Charles W. Bates* for respondent.

ON MOTION FOR REHEARING.

R. E. ROMBAUER, SPECIAL JUDGE.—The record in this cause is identical with the one in 12,563, except the amount sued for and the property sought to be charged with the lien of the special taxbill.

It is therefore ordered that the motion for rehearing be sustained, that the record entry of the judgment be amended, as is ordered to be done in cause 12,563, and as thus amended be affirmed, and that the cause be remanded to the trial court for further proceedings. In this disposition of the case *Reynolds, P. J.*, concurs. *Caulfield, J.*, not sitting. *Nortoni, J.*, dissents for the reason stated in his dissenting opinion in cause No. 12,563. The cause is therefore certified to the Supreme Court for final determination.

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DISSENTING OPINION.

NORTONI, J.—As the judgment of the court in this case involves the identical question and determines it in the same way as that involved in the case of Granite Bituminous Paving Company v. Parkview Realty & Improvement Company et al., (No. 12,563), between the same parties and decided today (168 Mo. App. 468, 151 S. W. 479), I respectfully dissent therefrom for the reasons given in the dissenting opinion filed in the case last mentioned. I deem the judgment of the court in this case to be in conflict with the judgment of the Kansas City Court of Appeals in the case of Forrey v. Holmes, 65 Mo. App. 114 and also with the judgment of the Supreme Court in the case of Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241, 146 S. W. 1142. and therefore request that the cause be certified to the Supreme Court for final determination, as provided in the Constitution.

GRANITE BITUMINOUS PAVING COMPANY, Respondent, v. PARKVIEW REALTY & IMPROVEMENT COMPANY et al., Appellants.

No. 12560.

St. Louis Court of Appeals, December 3, 1912.

1. **SPECIAL TAXBILLS: Enforcement: Parties Defendant: Purchaser at Foreclosure of Prior Incumbrance: Charter of St. Louis.** Where, within the two-years period of limitation prescribed by section 25 of article 6 of the Charter of the city of St. Louis, the purchaser of real estate, under foreclosure of a mortgage, was made a party defendant in an action to enforce a special taxbill for street improvements, issued against said real estate pursuant to said Charter, after the execution of said mortgage, the fact that the beneficiaries in said mortgage were

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not made parties defendant would be immaterial even though it were true that they would have been necessary parties had said sale not taken place, since their interest passed to said purchaser, who was made a party defendant; and hence the question of the validity of the lien, notwithstanding the non-joinder of prior incumbrancers, determined in Granite Bituminous Paving Company v. Parkview Realty and Improvement Company et al. (No. 12563), *ante*, is not in the case.

2. **APPELLATE PRACTICE: Questions Reviewable: Special Taxbills: Amendment.** The amendment of a special taxbill for street improvements, so as to name a different person as owner of the property assessed from that originally set out, is immaterial, where no question is raised as to the validity of the amendment, and where, in a proceeding to enforce the taxbill, no objection is made to its admission in evidence, as amended.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

JUDGMENT MODIFIED AND AFFIRMED AND CAUSE REMANDED (*with directions*).

Bland & Cave and *Carter, Collins, Jones & Barker* for appellants.

Sturdevant & Sturdevant and *Charles W. Bates* for respondent.

ON MOTION FOR REHEARING.

R. E. ROMBAUER, SPECIAL JUDGE.—The record in this cause is identical with the record in cause 12,563, in which an opinion has been filed today, except in three respects, namely:

First, that the amount of the special taxbill sued upon was only for $160.81; second, that the taxbill as originally issued was subsequently amended by the comptroller, so as to insert the name of the Parkview Realty Company as owner—the bill originally issued being one against the United Railways Company alone; third, notice and demand of payment was served on the Parkview Realty & Improvement Com-

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pany named *as owner* in the special taxbill on February 28, 1907, and not before.

Section 25 of article 6 of the Charter of the city of St. Louis provides the conditions under which a special taxbill matures. The maturity of any instalment of the bill, or of the entire bill, as may be, is thirty days after notice is served on the owner; hence the special taxbill sued upon in this case matured, as against the Parkview Realty Company, on March 30, 1907. The Nina Realty Company, which is the successor in title of the Parkview Realty & Improvement Company as well as of all the beneficiaries of the two mortgages of the Parkview Realty Company to the Lincoln Trust Company, was made a party defendant in the case on March 28, 1907, and within two years after the taxbill matured against the Parkview Realty Company and those claiming under it.

Since it cannot be claimed on any rational theory that the beneficiaries in a deed of trust or mortgage are necessary parties defendant to a suit for its enforcement, after its foreclosure, and when the legal and beneficial title alike have vested in the purchaser at foreclosure sale, and since the purchaser—namely the Nina Realty Company—was made a party defendant within two years after the maturity of the bill, the question of limitation does not arise in this case.

That the special taxbill was amended so as to name the Parkview Realty & Improvement Company as owner is of course immaterial, since no question is raised as to the validity of the amendment and no objection was made by defendant to the admission of the amended taxbill as evidence.

The same error appears by the record in making the judgment bear eight per cent interest from date of its rendition as in case 12,563.

It is therefore ordered that the motion for rehearing be sustained, and that so much of the judg-

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ment entry as contains the words "with interest at the rate of eight per cent per annum from the date of judgment until paid" be stricken from the record, and that the judgment as thus amended be affirmed, and that the cause be remanded to the trial court to proceed in conformity with this opinion. *Reynolds, P. J.* and *Nortoni, J.*, concur. *Caulfield, J.*, not sitting.

GRANITE BITUMINOUS PAVING COMPANY, Respondent, v. PARKVIEW REALTY & IMPROVEMENT COMPANY et al., Appellants.

No. 12562.

St. Louis Court of Appeals, December 3, 1912.

1. **SPECIAL TAXBILLS: Defenses: Nonconformity to Requirements of Charter of St. Louis: Burden of Proof.** In a suit to enforce a special taxbill for street improvements, issued pursuant to the Charter of the city of St. Louis, the *onus* of establishing allegations in the answer, that the taxbill was void, for the reason that, although the tract of land, of which the land involved in the suit formed a part, had not been subdivided, it was arbitrarily divided into lots for the purpose of making the assessment, contrary to the Charter provisions, and separate taxbills were issued against such lots, rested on defendant.

2. ———: ———: ———: **Sufficiency of Evidence.** In a suit to enforce a special taxbill for street improvements, issued pursuant to the Charter of the city of St. Louis, *held* that a defense pleaded, that the taxbill was void, for the reason that, although the tract of land, of which the land involved in the suit formed a part, had not been subdivided, it was arbitrarily divided into lots, for the purpose of making the assessments, contrary to the Charter provisions, and separate taxbills were issued against such lots, was not sustained by the evidence.

   [NORTONI, J., dissents solely on the ground stated by him in his dissenting opinion in Granite Bituminous Paving Company v. Parkview Realty and Improvement Company et al. (No. 12563), *ante*; the same questions being involved in this case.]

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Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

JUDGMENT MODIFIED AND AFFIRMED AND CAUSE REMANDED (*with directions*).

CAUSE CERTIFIED TO SUPREME COURT.

Bland & Cave and *Carter, Collins, Jones & Barker* for appellants.

The two taxbills, Nos. 3655 and 3648, sued on in cases numbers 12561 and 12562, issued against one lot are void. Sec. 14, art. 6, Charter of St. Louis.

Sturdevant & Sturdevant and *Charles W. Bates* for respondent.

Where the amount assessed against a tract of ground is correct the taxbills issued thereon are not void because two bills are issued, when the entire assessment on the particular tract might have been included in one bill. If the amount of the tax is correct the owner suffers no injury by reason of the two bills. Whittemore v. Sills, 76 Mo. App. 257.

ON MOTION FOR REHEARING.

R. E. ROMBAUER, Special Judge.—The record in this case is substantially the same as the record in cause No. 12,563, except touching certain matters hereinafter stated.

The taxbill was issued against the Parkview Realty and Improvement Company, the assessment amounting to $1015.16. The appellants, however, assign an additional error to those assigned in cause No. 12,563. Their answers state among other things:

"That said tract of land is used by this defendant as one lot, is fenced as one lot, tract or parcel of ground and has not been in any way subdivided

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either in fact or as shown by any recorded plats of additions or subdivisions to the city of St. Louis, and constitutes but one lot within the meaning of section 14 of article VI of the Charter of the city of St. Louis; that the assessment district for the improvement of Union avenue, for which the taxbill sued on was issued, extended at this point 1535 feet west of Union avenue and included the said tract of land for that distance west of Union avenue, and that under the provisions of section 14 of article VI of the Charter of the city of St. Louis all that portion of said tract of land lying and being within the said assessment district should have been assessed as one lot, in the proportion that its area bore to the area of the entire district, and one taxbill only should have been issued against the whole of such portion of said tract for such assessment; but that in fact, in making said assessment, the portion of said tract of ground within the assessment district was, arbitrarily and in violation and in contravention of the provisions of said section 14 of article VI, divided into two lots, one including said tract for 1140 feet west of Union avenue, and the other including the remainder of said tract within said district, and was assessed as two lots and two separate and distinct taxbills issued against it and two suits brought against this defendant on said two taxbills; that taxbill No. 3655, the bill here sued on, is one of the said two improperly issued taxbills, and taxbill No. 3648 on which a similar suit is now pending in Division No. 8 being cause No. 46,627 in said division, is the other, and that for the reasons aforesaid said taxbill No. 3655 here sued on is void."

This new matter in the answer was denied by plaintiff's reply, and put the *onus* of establishing it by evidence upon the defendants, but the defendants offerred no legal evidence to substantiate it.

Special taxbill No. 3648, referred to in defendants' answer, was not offered in evidence by defendants nor

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were the files in cause No. 46,627, referred to in defendants' answer, offered in evidence. The only testimony bearing on that subject is the testimony of Joseph Pasquier, an employee in the street department of the city of St. Louis, who testified on his cross-examination, and being recalled by the defendants, that two taxbills were issued against the property of the Parkview Realty & Improvement Company, one for a frontage of 1140 feet, and the other for a frontage of 395 feet; that these two parcels were at that time divided by the proposed center line of Belt avenue (since opened), and were in different blocks of the city of St. Louis as established by the street department.

Since the Charter makes the special taxbill prima facie evidence of a proper assessment, we cannot put the trial court in error for upholding its validity against defendants' contention that one taxbill only should have been issued, covering the entire frontage of 1535 feet.

The record also fails to show any objection on the part of defendants to the introduction of the special taxbill in evidence, because the objection contained at the bottom of page 26 of appellants' abstract is confined to the irrelevancy of certain deeds as evidence.

We have gone thus fully into this matter, since, in the foregoing discussion of the subject and the conclusion arrived at, all the members of the court agree.

The same error appears by the record in making the judgment bear eight per cent interest until paid, as in case 12,563.

It is therefore ordered that the motion for rehearing be sustained, and that so much of the judgment entry as contains the words "with interest thereon at the rate of eight per centum per annum from the date of this judgment until paid" be stricken from the record, and that the judgment as thus amended be affirmed, and that the cause be remanded to the trial

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court to proceed in conformity with this opinion. *Reynolds, P. J.,* concurs; *Nortoni, J.,* concurs in those parts of the opinion which uphold the validity of the taxbill *when issued,* but holds the same is barred by limitation. *Caulfield, J.,* not sitting.

In conformity with the order made in cause No. 12,563, the cause is certified to the Supreme Court for final determination.

DISSENTING OPINION.

NORTONI, J.—As the judgment of the court in this case involves the identical question and determines it in the same way as that involved in the case of Granite Bituminous Paving Company v. Parkview Realty and Improvement Company et al. (No. 12,563), between the same parties and decided today (168 Mo. App. 468, 151 S. W. 479), I respectfully dissent from the conclusion on that question alone, for the reasons given in the dissenting opinion filed in the case last mentioned. I deem the judgment of the court in this case to be in conflict with the judgment of the Kansas City Court of Appeals in the case of Forrey v. Holmes et al., 65 Mo. App. 114 and also with the judgment of the Supreme Court in the case of Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241, 146 S. W. 1142, and therefore request that the cause be certified to the Supreme Court for final determination, as provided in the Constitution.

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JAMES MALLEN, Administrator, Respondent, v. NATIONAL LIFE ASSOCIATION, Appellant.

Kansas City Court of Appeals, December 31, 1912.

1. **LIFE INSURANCE: Benefit Certificate: Soliciting Agent: Medical Examiner: Waiver.** An assessment company of life insurance had a form of application for a life benefit certificate divided into two parts. The first was merely an application for insurance, stating the amount and premium, etc. The second was an examination as to his health, freedom from disease, etc. The first was handled through a soliciting agent and the second through the medical examiner. An applicant informed the soliciting agent that he had the piles, a disease of the rectum, but the agent said it made no difference, and for him to say he had not, when asked that question by the medical examiner. The applicant then signed the soliciting agent's part of the application, and thereafter was examined by the medical examiner and answered that he did not have such a disease and warranted his answer to be true, and thereby obtained a benefit certificate. Within six months afterwards he died from an operation for the piles. It was *held* that there was no liability on the certificate.

2. **———: Agent: Applicant: Estoppel: Good Faith.** If an applicant for insurance who is required to give information as to his health, diseases, etc., informs the proper agent of the company that he has a certain disease, and the agent says it amounts to nothing and refuses to put it down, or writes that the applicant has no disease,—his act binds the company, if the assured acted in good faith.

3. **———: ———: ———: Conspiracy.** If an applicant for insurance conveys true information of a disease he has, to an insurance company's proper agent, and then he and the agent conspire together to defraud the company by suppressing such information, there is no liability.

4. **LIFE INSURANCE: Agency: Statute: Application: Fraud.** Though Sec. 6938, R. S. 1909, makes any person soliciting an application for life insurance, the agent of the company and not of the assured, such statute does not apply to a fraudulent conspiracy between the solicitor and the insured to deceive and defraud the company, but merely to the solicitor's acts within the limits of his agency.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burns*, Judge.

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REVERSED.

W. H. Douglas and *E. T. Harris* for appellant.

E. J. Smith and *W. S. Herndon* for respondent.

ELLISON, J.—Plaintiff is the administrator of Michael O'Loughlin, deceased, and brought this action on a certificate of life insurance issued by defendant company. The judgment was for the plaintiff.

It seems that the application for insurance with defendant consists of a first and second part. That separate agents of defendant are in charge of these. The first part of the application is under charge of a soliciting agent and is quite general in its statements. amounting to little more than signifying in writing a desire for the insurance, stating the amount and agreeing to pay the premium. The second is in charge of the medical examiner, who takes a statement of applicant's health and requires answers to specific questions as to diseases, attendance of physicians, etc.

Deceased was solicited for insurance by the soliciting agent. He declined, or at least stated he doubted if he could get it for the reason that he was afflicted with the piles. Whereupon the agent said that was of no consequence and made no difference, and when that question was asked him, to answer "no."

Then (date not given) deceased went before the medical examiner, who knew nothing of his fraudulent arrangement with the soliciting agent, and made and signed the second part of the application, in which he stated he did not have any disease of the rectum. This answer was knowingly false, though he warranted it to be true.

The fact was that deceased was badly afflicted with piles, and that in a less time than six months thereafter he died from an operation performed for that affliction.

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Plaintiff seeks to avoid deceased's false representation on the ground that defendant's agent was informed of the fact and said it made no difference, requesting him to answer "no" when the question was asked him by the medical examiner. It is settled law in this State that if the insurance company's soliciting agent is empowered to take written applications for insurance and is informed as to the facts and yet puts down a falsehood, or directs the applicant to do it, the company is nevertheless liable. [Shotliff v. Modern Woodmen, 100 Mo. App. 138; Floyd v. Modern Woodmen, 166 Mo. App. 166.] Since it would not be expected that a liability would attach if the applicant and the agent conspired to defraud the company, the foregoing statement of the law is on the assumption that the applicant acted honestly and in good faith.

In this case it was not the duty nor within the authority, real or apparent, of the soliciting agent, to receive information or make inquiry as to the character of diseases. The defendant company did not seek information of deceased's health through the solicitor. That authority was placed with the medical examiner, as deceased must have known, for it was before him his examination took place and his answers were written down and signed by him. Deceased knew he was not informing the company as to his disease, for he consented to the soliciting agent to suppress that information and to deny the existence of the disease to the men selected by the insurer to find out the facts. In Floyd v. Modern Woodmen, supra, true information was given to the medical examiner, who was the proper agent, and suppressed it.

Having determined that the defendant was not bound by the information given to its soliciting agent, and that it had no knowledge of deceased's false representations as to a disease of the rectum against which he warranted, and it appearing that his death

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was caused by an operation for such disease, it is apparent the judgment should have been for defendant. The verdict doubtless would have been for it under its instruction No. 3, if it had not been for plaintiff's No. 2, which was practically a peremptory direction to find for the latter.

But plaintiff claims a right to the judgment on the ground that the agent who solicited the insurance in the first instance was defendant's agent and not deceased's, under the terms of section 6938, Revised Statutes 1909, reading as follows: . . . Any person who shall solicit an application for insuranct upon the life of another shall, in any controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured, . . ." We readily concede that an agent of an insurance company who solicits a person to take out a policy of insurance, is the company's agent and that his acts, within the limits of his agency, are the acts of the company. But, of course, the statute was never intended to bind the insurance company in favor of an insured who enters into a fraudulent conspiracy with the agent to deceive and defraud the company.

The judgment is reversed. All concur.

SETH S. SERAT, doing business as the STAR COAL COMPANY, Respondent, v. B. F. FEAGANS, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. SALES: Account: Evidence. Where defendant admits that, every time he ordered coal shipped to him, an acknowledgment of the order was sent him by the vendor in which were stated the number of cars, character of coal, the date when to be shipped, and the price per ton, and further admits that, when the shipment was made, an invoice was sent to and received by

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him, in which were stated in detail the date, the car number, the weight of the coal, the price per ton, and the total amount due, all of which corresponded to the items set out in the account sued on, this establishes, prima facie, a separate sale of each car of coal at the prices stated in the invoices.

2. ———: **Purchase Under One General Contract: Burden of Proof.** Under the above circumstances, if the vendee claims the coal was purchased under one general contract to furnish all coal desired by him for a specified purpose at a different price, the burden is on him to establish it by the clearest proof, since it is in direct conflict with dealings actually had between them.

3. **CONTRACTS: Offer of Terms: Acceptance.** Where one party offers to furnish coal at a certain price and under one general contract, the offer, to become binding, must be accepted within a reasonable time and the vendor notified thereof. If this is not done, there is no contract and vendor is at liberty to withdraw offer.

4. ———: **Construction of: Court or Jury.** The construction to be placed on undisputed written correspondence is usually for the court and not the jury. This may not be a universal proposition since there may be cases in which on account of ambiguity in the language used, it should be left to the jury to say whether a reasonable man would be justified in treating it as a contract. But, even if the writing be ambiguous, when the admitted facts show that both parties treated it as not constituting a contract, the court is justified in construing it the same way.

5. ———: ———: **Question for Jury.** Where contract rests, partly in writing and partly in parol, and the parol portion is disputed, court must submit question of contract to jury.

6. ———: ———: **Establishment of.** Where defendant claims that a contract was created partly by letter and partly by a telephone conversation which is denied, it is incumbent on the defendant to show what was said in such telephone conversation, not merely his conclusion thereon. Nor will vague and uncertain testimony thereon be sufficient, if its purpose and effect be in conflict with the undisputed course of dealing between the parties.

Appeal from Johnson Circuit Court.—*Hon. A. A. Whitsett*, Judge.

AFFIRMED.

Jas. A. Kemper for appellant.

J. W. Suddath & Son for respondent.

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TRIMBLE, J.—This is a suit on account by respondent for nineteen carloads of coal and slack sold and delivered to appellant on different dates between September 30, 1909, and March 21, 1910, amounting to $1596.37 on which ten payments were made at different times between November 17, 1909, and April 16, 1910, aggregating $1200 leaving a balance due of $396.37 judgment for which was asked with 6 per cent interest from May 3, 1910. The account set out the dates each car was sold, the number of the car, number of tons in each, the price per ton, the amount due on each car at the price named, and the kind of coal in each.

It was shown in evidence that each car in the account was shipped upon a written order in the form of a letter from appellant; that, as soon as an order from him was received, an acknowledgment thereof was sent to and received by him in which was stated the number of cars, the character of coal, when same was to be shipped, *and the price per ton thereof*, exactly corresponding to those same items in the account; that, as soon as each car called for in the order had been loaded and weighed, an invoice was sent to and received by appellant which set forth in detail the date, the car number, the weight of the coal, *the price per ton*, and the total amount due, exactly corresponding to those same items set out in the account. Appellant admitted receiving these acknowledgments and invoices as they were sent; admitted that the cars as set out in the account were shipped on the dates specified and were received by him. He also admitted that he noticed the price per ton stated in the acknowledgments and invoices but made no objection thereto, and made no claim that the prices therein stated were too high or that they were governed by the contract until May 21, 1910, which was two months after the last car in the account had been shipped to and received by him.

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His defense is that he did not make a separate purchase of each car, but that the coal was all bought under one contract to furnish him coal at a price less than that charged in the account; that this contract was made, by both parties hereto, in view of the fact that appellant was about to secure the contract for furnishing the Warrensburg Normal School with fuel for the winter, and that respondent agreed to furnish enough to enable him to fill that contract; that, relying on his contract with appellant whereby he could obtain coal at a certain price and of sufficient quantity, he made a contract with the Normal and gave bond for his compliance therewith; that, at the price authorized by the contract, the payments made by him, aggregating $1200, more than paid for the coal sold; that owing to the failure of respondent to furnish enough coal to enable appellant to fill his Normal contract he was required to buy higher coal elsewhere and pay higher freight rates to his damage in the sum of $205.13, for which he asked judgment in a counterclaim.

There being no question but that appellant received the cars of coal sued for, and that upon every order sent in by him respondent shipped the cars called for, his exemption from liability under the petition, as well as his right to recover on his counterclaim, depends upon whether there was a contract to furnish all the coal needed for the Normal at the price claimed by appellant. If no such contract is shown, plaintiff must inevitably recover the amount due on the account.

The evidence relied upon to show one contract covering all the coal consisted of correspondence between the parties which is substantially as follows: About July 20, 1909, appellant wrote respondent telling him he was going to figure on the Normal contract and asking for prices on Weir City coal. Respondent replied July 20, 1909, that, if the inquirer

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was in a position to give him shipping instructions during July, August and September, he would make a price of $1.75 per ton f. o. b. the mine and a price based on the market on orders placed thereafter with a maximum of $2 per ton, and followed this with another letter on July 27, 1909, making a price during July, August and September of $1.75 per ton on Weir City lump coal and after September until April 1, 1910, a price of $2 per ton. On August 16, 1909, Feagans wrote respondent that he had secured the Normal contract for coal and that the school authorities would determine that week whether they would take Lexington lump or Weir City coal and that he would write as soon as they decided. This letter was not an out-and-out acceptance of respondent's offer but merely a notification that he had the contract and would write them further when he learned the kind of coal the Normal wanted. To this respondent replied August 18, 1909, acknowledging notice that Feagans had secured the contract to furnish the Normal with coal and saying that he hoped to enable Feagans to do the proper thing with the State Normal business, which was only another way of saying he hoped Feagans would accept his offer. August 19, 1909, Feagans wrote acknowledging the respondent's letter of the 18th and asking if respondent could furnish him Cherokee lump and *at what price,* explaining that the janitor of the Normal thought that Cherokee was better for steam purposes than Weir City. To this respondent, on August 20, 1909, replied that he did not anticipate any trouble in giving either Cherokee or Weir City but rather thought he would be in better shape to give Cherokee and would like to have his order at the earliest possible moment, at the prices quoted in his letter of July 27, and closed by hoping this would be satisfactory and that he might have Feagans' order. Not hearing anything from Feagans

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respondent on August 25 wrote him asking him when he expected shipments to begin to move on the Normal School contract. Still not hearing from Feagans, respondent, on the 30th of August, 1909, again wrote him asking for an order from him. On September 4, 1909, respondent again wrote Feagans saying he understood the Normal would take Cherokee together with a small amount of Lexington coal and expressed the hope that Feagans would arrange to place his order with respondent at once and closed by urging his prompt attention to the matter. To none of these did Feagans make any reply. On September 21, 1909, Feagans wrote ordering a load of Cherokee lump shipped on the 22nd and another on the 25th and followed it with a letter on September 24, 1909, directing two other loads to be shipped, one on the 27th, and the other on the 30th, and saying that he would write when he wanted more. To this respondent on September 25, 1909, replied as follows:

"Sept. 25, 1909.

Mr. B. F. Feagans,
Warrensburg, Mo.,
Dear Sir:

This will acknowledge receipt of your favor of the 21st, also of the 24th inst. requesting us to ship you all told four cars of Kansas lump coal to apply on the Normal School contract.

On Aug. 12 you called us up over the 'phone and stated that this business would come up in the next couple of days, and a few days later you called us up and advised that you had secured the business and we of course naturally expected to receive orders from you at once.

Not hearing from you within a reasonable time we wrote you under date of Aug. 25, Aug. 30, and Sept. 4, yet received no response whatever to our communications. We naturally took it for granted that you had

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changed your mind and did not intend to give us the business.

Consequently, we made no preparation to take care of the same. As a matter of fact at the present time all mines on the Missouri Pacific are in a most deplorable condition on account of not receiving cars. What little coal is being loaded in the Southern Kansas district is taken by the railroads. Everyone is behind on their orders for shipment to Missouri Pacific closed points *and are only accepting orders subject to prices effective when the shipments are made.*

I could not give you any idea when we could ship this coal and believe it would be an injustice to accept the orders under the existing conditions.

However, if you can arrange to use Panama or Ovid, Missouri coal, which is nicely prepared lump, and in my opinion would fill the bill, we will protect you on a price of $1.60 f. o. b. mine, and have the shipments made at the earliest possible moment. As you doubtless know this coal is very similar in appearance to Southern Kansas.

Regretting the circumstances which have arisen, but over which I assure you we had no control, and awaiting your further pleasure in the premises, I am,

Yours truly,
E. R. Dusky,
General Sales Agent."

The claim of appellant is that respondent's letter of July 27, together with that of August 20, as to terms, resulted in a contract between them for all coal needed for the Normal at the price stated therein. The respondent claims that the letters mentioned constituted merely a proposition that was never accepted on the part of Feagans. But whether a contract was effected or not is not very material since the letter of September 25, 1909, above set out declines to enter into any such contract on account of failure to hear from Feagans, and Feagans admits that the contract,

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which he claims existed prior to this letter of September 25, was abandoned by mutual agreement but he asserts that in this letter a new contract was offered as a substitute whereby Panama or Ovid coal would be furnished instead of Weir City at $1.60 per ton; that this letter, together with a telephone conversation had between the parties on September 27, constituted a new contract under which he bought all the coal sued for. Respondent insists that the letter refers only to the four cars mentioned and not to all of the coal necessary to enable appellant to fill his contract with the Normal.

So that the question whether a contract was made depends upon the construction to be placed on the letter of September 25, and the evidence as to the conversation taking place over the telephone on the 27th.

At the close of the evidence the cause was submitted to the jury upon the instructions of the court that the defendant had no contract to furnish all the coal needed to fill his Normal contract and hence could not recover on his counterclaim, and if the jury found from the evidence that defendant ordered each of the cars of coal set out in plaintiff's petition and that plaintiff accepted each of the orders in writing stating therein the price at which accepted and afterwards sent defendant an invoice in writing when each car was shipped, stating the price per ton, the number of tons and the total price therefor, then the jury should find that each of the orders and acceptances constituted a separate complete contract, and the defendant immediately became indebted to plaintiff upon each of said shipments in the amount therein named, and is indebted to plaintiff in the aggregate amount of said shipments less the amount he has paid thereon, with interest at 6 per cent from May 3, 1910. The court refused defendant's instruction which submitted to the

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jury the question whether there was a contract between plaintiff and defendant for Panama or Ovid coal in sufficient quantity to supply the Normal, during the school year, at $1.60 per ton. The jury returned a verdict for plaintiff for the balance due on the account with interest at 6 per cent from May 3, 1910, aggregating $431.05, and found for the plaintiff on defendant's counterclaim.

There is no dispute over the fact that demand was made on May 3, 1910, for the balance due on the contract. The undisputed testimony shows that respondent shipped more coal to appellant than the latter actually furnished the Normal. In fact, the only dispute in the testimony is on the question whether or not the telephone conversation of September 27, in connection with the letter of September 25, constituted a contract to furnish, at $1.60 per ton, the coal necessary for the Normal. The contention of appellant is that it was for the jury to say whether such telephone conversation created a contract, and his complaint is that the court improperly took this question from the jury.

So far as the construction to be placed upon the undisputed written correspondence is concerned, it was the court's duty to construe the letters and tell the jury their legal effect. This may not be true as a universal proposition since there may be cases in which, on account of the ambiguity of the language used, it should be left to the jury to say whether a reasonable man, would be justified in treating it as a contract. But, even if it be considered that the letter of September 27 is ambiguous as to what coal it referred to, yet when the admitted acts of both parties thereafter show clearly that they did not consider it covered all the coal necessary for the Normal, it is the duty of the court to construe the writing. The appellant, however, contends that his contract rests partly on the telephone conversation of September 27.

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Undoubtedly, if any evidence at all exists tending to show what words were said in the telephone conversation which would create the contract apellant contends was made. then it was for the jury to say whether such words were said. And if that were the situation here, the court had no right to tell the jury appellant had no contract for the amount of coal and at the price he claimed. But a careful examination of the testimony shows that no evidence was given as to what was said over the telephone which either court or jury could say constituted a contract, or pieced out the letter of September 25, so as to make a contract. At most it is only plaintiff's conclusion that it made a contract. That this is true appears from the following testimony given by appellant on direct examination:

Q. Now, a letter mailed in Kansas City the 25th reaches here the next day? A. Yes, sir.

Q. I will ask you to state whether or not this gentleman here (referring to plaintiff's Sales Agent Dusky) called you by telephone on the 27th day of September and informed you, as he has said upon the witness stand that he couldn't furnish you the coal and would not furnish it to you? A. I don't know whether it was that day or not, sir.

Q. Well, when was it? A. I don' know, sir. A letter followed that, saying that the mine was in a deplorable condition; I don't know what time that followed that letter—what time the telephone message was received. Don't remember anything about that but he writes me that the mine is in a deplorable condition, hard to get cars, and he didn't see how they was to furnish the coal; that was directly after this I don't know how many days.

Then afterwards still on direct examination:

Q. Now following this letter which was written on the 25th of September in which it was offered to supply or furnish you coal at $1.60 f. o. b. mine, state whether or not on the second day after that this gentle-

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man here called you up and talked to you about supplying that coal, and if he did, tell the jury what he said to you. A. Well, he said it was just as good coal and as good as the Weir City coal and would fill my contract and he would make a price at $1.60 f. o. b. mine.

Q. He said he would fill the contract you say? A. Yes, sir.

Q. With that coal? A. Yes, sir.

And on cross-examination appellant's testimony on this point was as follows:

Q. Now you say on the 27th, or within a few days after you received this letter of the 25th of September, that Mr. Dusky called you up over the phone and had a talk with you; is that correct? A. Yes.

Q. And he told you in that conversation that he couldn't furnish you the coal except at current prices did he not? A. Did not, sir.

Q. What did he tell you? A. He didn't say a word about it to me about current prices or anything else; he never said it, Mr. Suddath, in all my transactions.

Q. Now listen; I am asking you what he did tell you. A. Well, sir, he never told me anything I remember about the coal prices at all.

Q. What did he call you up for? A. Well, sir, it was on some other business; now if Mr. Dusky ever mentioned that to me I don't remember anything about it.

Q. What was the occasion of his calling you up? A. I can't call to mind what it was; but Mr. Dusky never intimated that to me.

Q. Well, then, will you tell us what he did tell you? A. I don't know whether he told or whether I got a telephone message then. Mr. Dusky never done any such thing.

Q. You testified to that, to Mr. Kemper and myself, that you did get a telephone message? A. I un-

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derstand that, but you are telling me what he said to me. He never said that to me over the elephone.

Q. What did he say? A. *I don't know.*

Now it was not incumbent upon the plaintiff to show that, in the telephone conversation, he had declined to recognize the contract of July 27 because his letter of the 25th shows that. But it was incumbent upon defendant to show what was said, since he was claiming a new contract was made. Plaintiff's agent, Mr. Dusky, had testified that, in addition to his letter of September 25, he had said over the phone on the 27th he would not furnish the coal under the former offer because of Feagan's delay in accepting it, and a careful analysis of defendant's testimony as to the telephone conversation shows that he does not state what the conversation was, but merely denies that Dusky declined to fill the orders, and, when asked to state what was said which would show whether a new contract as created or not, he replied that *he did not know.*

So that there was no evidence tending to show a contract originating in a letter and completed over the telephone. Hence the court was justified in telling the jury defendant had no contract by which he was to obtain sufficient coal, at $1.60 per ton, to enable him to supply the Normal School. Even if the letter of September 25 was so worded as to lead a reasonable man to think it proposed such a contract, still the acts of both parties show conclusively that they did not so construe it. When each car was ordered, plaintiff acknowledged receipt stating the prices at which it was to be shipped, and defendant allowed it to be shipped without comment or objection. When it was shipped an invoice was sent along showing the price per ton at which it was sold and the defendant received it without objection, disposed of the coal as shipped, and made ten remittances in payment without disputing the prices. These prices were as stated in the petition

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and although plaintiff sent defendant a statement on December 1, 1909, showing how his account stood, and, between the first and tenth of each month thereafter, mailed statements of the amount due at the prices claimed in the petition, yet defendant made no objection thereto and continued to order and receive coal and make payments thereon, and it was not until May 21, 1910, two months after the last car had been shipped, that defendant made any complaint or objection whatever. A careful reading of the entire record shows that the judgment was for the right party and that the court did not err in refusing to submit the question of a contract to the jury. Hence we affirm the judgment. All concur.

LEWIS M. CHORN, Respondent, v. MISSOURI, KANAS & TEXAS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **CARRIERS OF LIVE STOCK: Yards: Turntable: Pit.** C shipped a carload of mules over a carrier's road to St. Louis to market. There was a transfer point where the car would be put into a St. Louis train. They arrived there late in the afternoon, when he learned the other train was late. His car was set on a side track and he was informed by the conductor that the caboose in which he was to ride would not stop at the station but would have to be taken in the yards about where the car was. He went to the station and made inquiry about the train and was informed from time to time of its getting later and later. Finally near twelve o'clock at night he went with the crew which was to take the incoming train, to a restaurant which was used by the carrier as a shelter, some distance from the station proper, and there they waited until near one o'clock when the crew left to make up a train. C followed them over a path across the railroad yards towards where the caboose was to be. He presently fell into an unguarded turntable pit dug into the path, and was injured. The carrier was held liable in damages.

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2. ———: ———: ———: **Side Track: Caboose: Trespasser.** A carrier left a car of live stock on a side track in the railroad yards at a transfer point, in order that an incoming train might carry it on to destination. The shipper accompanied them and he was told by the conductor that the caboose in which he was to ride would not stop at the station, but would start from up in the yards. *Held*, that the shipper was not a trespasser in going along a path through the yards after night in order to reach the caboose.

3. ———: ———: ———: **Directions of Conductor: Shipper.** A shipper of live stock has a right to rely upon the directions of the conductor as to where the caboose in which he is to ride will start from.

4. ———: ———: **Stock Pass: Statute: Conditions.** The statute requires carriers to give shippers of live stock a pass that they may accompany it, on condition that the shipper cares for the stock and releases the carrier from such care. The carrier has no right to impose any other conditions on the shipper by reservations written or printed in the pass, and such reservations are without force.

5. ———: ———: ———: **Negligence: Contributory Negligence: Contract.** A shipper is always held to responsibility for his contributory negligence, and a carrier will not be permitted to contract against his own negligence.

Appeal from Cooper Circuit Court.—*Hon. John M. Williams*, Judge.

AFFIRMED.

W. G. & G. T. Pendleton and *Lee W. Hagerman* for appellant.

S. C. Major and *Roy D. Williams* for respondent.

ELLISON, P. J.—Plaintiff's action is for damages on account of personal injuries received, as he alleges, by reason of defendant's negligence. He recovered judgment in the circuit court.

In the month of December plaintiff shipped a lot of mules on defendant's road from Fayette to St. Louis, Missouri. An acquaintance named Davis

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shipped mules on the same train. The train, or at least the cars in which the mules were, were to become a part of a St. Louis freight train at a station called New Franklin, not far from Fayette, the starting point. They arrived at New Franklin about four o'clock in the afternoon, where they were put on a side track to await the St. Louis train. The point where the cars with the mules stood, was about half way between the New Franklin station house and defendant's turntable where plaintiff was hurt, the distance between the turntable and the station being about one mile. On arriving at New Franklin the conductor told plaintiff he should ascertain from the station agent or yard master when the St. Louis train would come in, saying to him: "You will have to catch the caboose down this way. If you wait at New Franklin you cannot catch it there." After assisting a mule, which had hurt his foot, in the car door, plaintiff and Davis went down to the station to ascertain from the agent when the St. Louis train would come in. They were told by him that he could not say until later. They then had supper and returned to the agent, who said their train would not get in until about ten o'clock. Later he informed them it would not come in until after eleven and a little later said it would be after twelve o'clock. Plaintiff and Davis then thought they would walk back to the car to see how the injured mule was getting along. They saw a switch engine and the crew which was to take charge of the incoming train when it arrived, start towards that part of the yards where their caboose would most likely be placed, and they followed to a restaurant at what is known as Franklin shops and which is used as a shelter and depot for train crews and passengers who may be at that place. Here the crew, Davis and plaintiff waited for nearly an hour, when, at about one o'clock the crew left, stating they were going to make up a train. They went in the

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direction of plaintiff's mules and where the caboose was afterwards placed, it being the direction the conductor had said he would catch the caboose. Plaintiff, without a lantern followed along the same path, which was about seven feet wide. The pit of a turntable had been dug three feet into this path and several feet deep. It was unlighted and there were no guard rails, so that plaintiff, having no knowledge of the danger, fell into it and was injured. He had known of the turntable, but had never examined it. It was shown by several stock shippers that they had always been told to get into the caboose at about the point plaintiff was directed; and it further appeared that plaintiff was informed that the caboose would not stop at the station and he therefore could not get into it at that point.

There is considerable said by the parties as to distances and directions from one to another of the many points which were gone over in the testimony. At this stage of the case these things are of no particular importance. The substantial matter is, that defendant's arrangement of things at its yards at this transfer point for St. Louis live stock freight, which is always accompanied by persons in charge, is such that in order to take the caboose in which these persons must ride, it is necessary to go over or through the yards. In this instance the St. Louis train which was to convey the stock to St. Louis was many hours late. This naturally caused plaintiff and his companion to leave the car and go to the station. They could not of course be expected to stand out through a winter night by the car of mules. It was natural that the plaintiff should ask questions of the defendant's agent as to the time the incoming train would arrive, and to repeat these questions when the prior answers developed to be incorrect. The fact that the caboose was not to be stopped at the station as a passenger car should be, made it necessary that the

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yards should be passed over to get into it at the distant point it was placed. There is no good reason for designating plaintiff as a trespasser. He was invited onto defendant's premises to transact business of profit to it, and it was its duty to use reasonable care to assure the reasonable safety of those premises. [2 White's Personal Injuries on Railroads, secs. 567, 630; Hollis v. Merchants Ass'n, 205 Mo. 508, 520, 521; Glaser v. Rothschild, 221 Mo. 180, 185, 186, 192-194; Carr v. Railway Co., 195 Mo. 214, 226.]

Plaintiff was justified in relying on the statements and directions of the conductor and agent as to where the caboose would be and that it could not be taken at the station. [Griffith v. Mo. Pac. Ry. Co., 98 Mo. 168; Nurse v. Railway Co., 61 Mo. App. 67; Gunderman v. Railway Co., 58 Mo. App. 370; Chase v. Railway Co., 134 Mo. App. 655; Albin v. Railway Co., 103 Mo. App. l. c. 317.]

Defendant sought to escape liability by pleading in its answer that plaintiff was travelling on a "stock pass" and that it had provided certain rules and regulations of the conduct of such passengers, which were named in the pass, who if they accepted the pass did so on condition of observation of these rules. This part of the answer was stricken out and we think properly. The statute (Sec. 3122, R. S. 1909) compels a carrier of live stock to furnish the shipper with a pass and prescribes the consideration for such pass shall be that the shipper give the stock necessary care and attention and release the carrier from liability for lack of such attention. The shipper is not required to enter into additional obligations and conditions, and any reservation of such in the pass is without force. Certainly the shipper would be chargeable with any negligence in want of proper precautions and conduct which might contribute to his injury; and all such character of defense was left in the answer. It did not need the aid of

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a provision, or reservation, in a stock pass in order to be available. Defendant was properly required to stand on the two questions: Its own negligence and plaintiff's contributory negligence, if any; it being always understood that the carrier cannot make a valid stipulation against his own negligence. [2 White's Personal Injuries on Railroads, sec. 856; Carroll v. Mo. Pac. Ry. Co., 88 Mo. 239.]

The instructions are without fault. Those for the defendant were clear and liberal. Together, the jury was fully and clearly informed as to the issues and the rights of either party.

Instruction D, offered by defendant, was properly refused. All that was proper in it was included in B, which was given.

We are satisfied no ground for our interference exists and hence affirm the judgment. All concur.

LULU B. RUMANN, Respondent, v. SARAH E. MONTFORT, et al., Appellants.

Kansas City Court of Appeals, February 3, 1913.

1. **NEGLIGENCE: Boarding House: Guest: One Management: Two Houses.** Two persons conducted a boarding house which adjoined and was attached to another house by the side owned by one of them. The houses adjoined and were attached; a common porch ran in front. A register of guests, a dining room and a parlor in one was used in common for both houses, and one of the persons collected from the guests in either house. The halls and public places in each were used in common. The evidence tended to show that the two were conducted as one establishment. A woman guest took board and a room in one of the houses. In a few days she went to visit a friend rooming in the other house and remained until nearly dark. As she started to leave she asked for the toilet room and was directed to go down to the lower end of a hallway. She went, and finding a door ajar, supposing it led into the toilet, she pushed it open thinking to step inside and turn on the electric light. Instead, she fell headlong in the dark onto a steep stairway into the cellar, and was injured. It was *held* that the boarding house keepers were liable.

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2. ———: **Innkeepers: Duty: Premises.** Keepers of a public inn are considered as inviting guests to their premises and it is their duty to keep their premises reasonably safe for the use of their guests, a failure in which is negligence.

3. ———: ———: ———: **Pleading: Instruction.** An instruction for plaintiff must not depart from the issues tendered in the petition; but it need not use the language of the pleading. It is sufficient if it submits, in practical effect, the same facts, with certainty.

Appeal from Clay Circuit Court—*Hon. Francis H. Trimble,* Judge.

AFFIRMED.

Martin E. Lawson and *Craven & Moore* for appellants.

E. N. Powell, T. C. Sparks and *Ralph Hughes,* for respondent.

ELLISON, P. J.—Plaintiff alleges that she suffered personal injury through the negligence of defendants, and her action is for damages on account thereof. She recovered judgment in the circuit court.

It appears that the two defendants, who are sisters, conduct a boarding and rooming house at Excelsior Springs, and that adjoining and annexed thereto is a rooming house conducted by one of them. Plaintiff claims, and there was evidence tending to show, that one of the houses was numbered 206 and the other 214, and to all appearances the two were run as one, under one control. That they were connected by a common porch and were used in common by the occupants of each. The guests of both registered on a common register in 206, and one of defendants had active management of both, assigning guests and collecting charges. The common porch was used by guests of each and there was but one parlor and one dining room and they were used in common.

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Number 214 was known as the "annex." Each had a toilet room.

On September 14, 1910, plaintiff became a guest in No. 206, and on September 23 she was invited for a social call in the annex. She remained until after six o'clock and it began to grow dark. As she started to return to her own apartment she asked the housekeeper to direct her to the toilet room, and was told that it was at the side door in the back of the hall. She started there and came to a side door which appeared to be the one designated. The door was ajar and she thought it was the bath and toilet room. She pushed the door open, it was dark, and she thought she would step in and turn on the electric light. As she expressed it on the witness stand, she took the step into space. The door, instead of being the entrance to the bath room, led onto a stairway descending into the basement. There was no platform space inside, so that one unacquainted would likely plunge headlong down to the bottom at the first step.

Conceding defendants to have been in charge of that part of the building known as No. 214, we have no hesitation in saying that it was a question for the jury whether they were guilty of negligence in allowing the hallway leading both to the toilet and basement to be constructed and kept in the manner shown.

But defendants, in effect, say that they did not owe a duty to plaintiff, since she was not a guest of No. 214, and that where there is no duty there cannot be negligence. We think, however, that there was evidence tending to show that the buildings were being conducted by defendants as one boarding house, under one management, with right of the guests to the use of all the public parts of each in common.

Defendant's chief objection is to the instructions given for plaintiff. It is said that the instructions permit a recovery on a theory not set up in the petition in that the petition set up a right to recover because

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plaintiff was a guest, while the instructions authorized a recovery if she "believed" she was a guest. Now of course there cannot be a recovery on any theory not set out in the petition. But an instruction need not be couched in the same language of the pleader. If they are the same in legal intendment,—if they mean the same thing,—if they convey to the mind the same fact,—they are in harmony. The instruction was fashioned to meet the nature of the evidence which had been properly admitted under the petition. That is, if defendants led plaintiff to believe it was all one place and that all public parts thereof were for the use of all the guests, then she was a guest in the use of such parts.

It is a part of defendants' insistence that the instruction also departed from the petition in submitting a characer of duty owing to plaintiff in "keeping the hall and passways reasonably safe for plaintiff's use thereof," when the petition charged negligence in keeping a hallway with a door leading immediately onto a dark and deep stairway to the basement. While the instruction does use the language quoted, it proceeds immediately to submit the matter pleaded as to plaintiff's use of the hall and of her stepping through the doorway out of the hall onto the steps.

There were some other criticisms of the instructions, but they are thought to be unsubstantial. Certain it is the jury, considered as reasonable men, could not have been misled as to the issues in the case.

Defendants, as keepers of a public inn, must be considered as inviting plaintiff to their premises to use in the way such places are customarily used by guests, and it was their duty to keep the premises reasonably safe for such use, a breach of which would be negligence. [Hollis v. Merchants Ass'n, 205 Mo. 508, 520; Glaser v. Rothschild, 221 Mo. l. c. 193, 194;

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O'Donnell v. Patton, 117 Mo. l. c. 18, 19; Shaw v. Goldman, 116 Mo. App. l. c. 338] . We do not think cases cited us by defendants, including Reynolds v. St. Louis Southwestern Railway, 162 Mo. App. 618, are applicable to the facts of this case.

We think there is no just ground for charging plaintiff to have been guilty of contributory negligence as a matter of law. On the whole record we are satisfied no reason exists justifying an interference with the judgment and it is accordingly affirmed.

Johnson J., concurs. Trimble J. having tried the case while judge of the circuit court, not sitting.

EDNA SCOTT, Respondent, v. ST. JOSEPH RAILWAY, LIGHT, HEAT AND POWER COMPANY, Appellant.

Kansas City Court of Appeals, February 3, 1913.

1. **NEGLIGENCE: Stepping Off a Street Car: Credibility of Witness.** The plaintiff sued to recover damages sustained by the negligence of the defendant in operating its street car. The plaintiff and her nephew were riding on the defendant's street car and, desiring to transfer at the end of the line, the plaintiff was in the act of stepping from the rear vestibule to the first step, when the car suddenly started forward, throwing her to the pavement and injuring her. *Held*, that the judgment in her favor will not be disturbed.

2. **———: Perjury or Mistake: New Trial.** The statute (Sec. 2022, R. S. 1909) makes it the duty of the trial judge to grant a new trial, when satisfied that perjury or mistake has been committed by a witness and such injury or mistake resulted in an improper verdict.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

AFFIRMED.

R. A. Brown for appellant.

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Mytton & Parkinson for respondent.

JOHNSON, J.—Plaintiff alleges she was thrown from a street car on which she was a passenger by the sudden starting of the car, and prays for the recovery of her resultant damages on the ground that the injury she received was caused by the negligence of the operators of the car in starting it while she was in the act of alighting. The answer is a general denial. The cause is here on the appeal of defendant from a judgment of three thousand dollars recovered by plaintiff in the circuit court.

The injury occurred in the afternoon of December 15, 1910, at the end of the Krug Park line of defendant's street railway system in St. Joseph. Plaintiff and her nephew, who was thirteen years of age, were passengers on an outbound electric car and, desiring to transfer at the end of the line to a connecting suburban car, proceeded to alight when the car stopped at that point for the discharge of passengers. There were five departing passengers and plaintiff was the last to leave the car. She and her nephew, who claims he was watching her, state she was in the act of stepping from the rear vestibule to the first step when suddenly the car started forward, throwing her to the pavement. The conductor and motorman introduced as witnesses by defendant deny she was thrown from the car or that it started forward before she had alighted in safety. The other passengers did not see plaintiff fall but immediately thereafter their attention was attracted to her and they observed her lying on the pavement. Two young women who were approaching the stopping place to board a car also had their attention drawn to the scene and hastened to the assistance of plaintiff who appeared to be injured and in need of help. The testimony of these witnesses very strongly corroborates the statement of plaintiff and her nephew that she had

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fallen from the car and had sustained severe and painful injuries. Plaintiff was taken into a nearby residence and remained there until an ambulance came and removed her to a hospital. Before her removal a physician was called and the examination he made in the presence of some of the witnesses disclosed a severe and recent bruise at the base of the spine covering an area including the coccyx and sacrum—the last two sections of the spinal column. The physician testified:

"The skin was just grazed as though it had been rubbed or something, just enough so that the blood would just stand to the surface . . . it was fresh . . . and was over the sacrum and coccyx . . . she seemed to be suffering a great deal of pain, she was suffering shock enough that I administered strychnine at that time." He followed her to the hospital and made another examination there. He states: "I had her put to bed and I examined the coccyx and found it misplaced and showed evidence of having been fractured."

Plaintiff was in the hospital from December 15 to February 27 and her condition during that time thus is described by the physician:

"When she entered the hospital, it seemed to be shock and pain from the lick that she had received or fall or whatever it might have been, and then in about a week this trouble with the ovary and appendix developed, and I kept the ice on her, I think, for about four or five days until that was allayed, and then she suffered more from nervousness than anything else from that on, complained of pain down the limbs, over the sciatic nerve and over the plexuses of the nerves that are given off to the spine, and she complained of that off and on at times, and then I don't remember just how long, but I think something like about three weeks, her stomach commenced bothering her, and she

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suffered from that on mostly from peptic ulcer of the stomach.

"Q. What seemed to be her condition at that time, describe it? A. Why, it was anaemic. We had to remove food from her. We removed the food from her. She vomited a great deal and was gradually declining in strength, mostly on account of not being able to take nourishment; in fact had to give her nourishment by the rectum."

The physician states that in his opinion the ulcers in the stomach could not have resulted from an external injury but that the other afflictions might have had such origin. We have gone into these particulars of the evidence relating to plaintiff's condition because of the earnest contention of counsel for defendant that the court should have granted a new trial on the ground of the manifest perjury of plaintiff in her testimony on the subject of the cause or causes of the ill health from which it is conceded she is suffering. Plaintiff ascribes her wretched condition to the injury she received from the negligence of defendant, while the evidence of defendant very strongly tends to show that plaintiff was an invalid at the time of the occurrence in question, that she was a nervous wreck, a victim of syncope and a sufferer from peptic ulcers in the stomach, and from anemia. Further it appears that five or six years before the injury in question she had been injured in a fall on a sidewalk and subsequently had prosecuted an unsuccessful suit against the city on account of that injury. The testimony she gave in that case was introduced in evidence. She there claimed that her injuries consisted of a permament injury to her knee cap, of three fractured ribs, of nervous shock, and a permanent impairment of her nervous system and of internal injuries of a nature to cause her to spit blood continuously.

The statutes (section 2022, Rev. Stat. 1909) make it the duty of the trial judge to grant a new trial when

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satisfied that perjury or mistake has been committed by a witness and that such perjury or mistake resulted in an improper verdict. The object of this provision is to clothe the trial judge with a wide discretion to be exercised in the furtherance of substantial justice. He is a trier of fact as well as an expounder of law and, enjoying the advantage of meeting the parties and witnesses face to face, should pass on the question of the credibility of witnesses and the weight of their evidence to the end that none but true verdicts may be suffered to stand. When satisfied that the verdict is unjust he should set it aside and it would amount to a monstrous perversion of justice and a gross dereliction of duty should a trial judge allow a verdict to stand which he was convinced was the product of perjured testimony. [Rickroad v. Martin, 43 Mo. App. l. c. 604; Ridge v. Johnson, 129 Mo. App. l. c. 546; Dean v. Railroad, 229 Mo. l. c. 452.]

As an appellate court, our duty with respect to granting a new trial on the ground of perjured testimony is different from that of the circuit judge. We have no authority to solve issues of fact in law cases. Where the questions of the credibility of a witness and of the weight of his testimony are presented by the evidence as controverted issues—as subjects about which there is room for a reasonable difference of opinion—their solution belongs exclusively to the province of the triers of fact and we have no ground for interference.

We must begin with the presumption that the trial judge was not unmindful of his duty when he refused to grant a new trial on the ground of the perjury of plaintiff and that his ruling was prompted by the conclusion that it had the support of the weight of the evidence. To overturn this presumption the record must disclose that the ruling is unsupported by substantial evidence. We have authority to examine evidence in a law case to ascertain whether or not it is

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endowed with probative value, but finding it thus endowed our function with respect to the evidence ceases. When it is within the scope of the discretion conferred on the trial judge by the statute we have mentioned, a ruling granting or overruling a motion for a new trial on the ground of perjured testimony is not open to review in the appellate court though the latter tribunal may believe that such ruling is supported only by substantial evidence and not by the preponderance of the evidence.

With these rules in mind we do not hesitate in saying that it would be unjust for us to hold as a matter of law that plaintiff was guilty of perjury in her testimony.

The evidence tending to show that she was thrown from the car by the negligence of the servants of defendant not only is substantial but is very strong as is also the evidence that she sustained physical injuries from her fall. The evidence does disclose a serious conflict over the issue of the extent of those injuries. The jury would have been justified in finding that plaintiff was attempting to magnify her injuries to an extent that would enable her to recover damages for the results of prior injuries and for ill health produced by other causes, and the trial judge could not be said to have abused a sound discretion had he set the verdict aside on such ground, but both judge and jury who enjoyed the advantage of observing plaintiff and her witnesses found their testimony was given in good faith and was worthy of belief. Such finding is sustained by substantial evidence. True, plaintiff claims her injuries produced certain results similar to those she alleged and testified in her prior suit against the city had resulted from a former injury, but it does not necessarily follow she testified falsely at either trial. The whole subject of her credibility and of the weight of her evidence are presented as issues of fact and we perceive no good reason for interfering with the action

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of the circuit court in overruling the motion for a new trial.

Defendant complains of the second instruction given at the request of plaintiff. That instruction is similar to the second instruction given for the plaintiff in the case of Bell v. Railroad, 125 Mo. App. 660, and for the reasons stated in our opinion in that case we hold the present instruction is free from prejudicial error.

A careful examination of the record convinces us that the cause was fairly tried and accordingly the judgment is affirmed.

All concur.

PETER E. MANNING, Defendant in Error, v. JOHN McCLURE et al., Plaintiffs in Error.

Kansas City Court of Appeals, February 17, 1913.

1. **REPLEVIN: Rescission: Pleading.** In a replevin suit based upon a rescission of a contract for false and fraudulent representations, it is not necessary that the petition should use the word "rescinded." If it states facts from which a rescission follows as a legal consequence, this is sufficient. The petition contains all the allegations necessary in this kind of a case.

2. **CONTRACTS: Rescission: Statu Quo.** Although plaintiff, after trading for and receiving the land, placed a mortgage thereon, yet as the evidence shows this was for the sole benefit of defendants and the money was used entirely to pay their debts, this would not preclude him from rescinding. The defendants were about to put the mortgage on it themselves but it was agreed that plaintiff should give the mortgage after he got the land rather than take it subject to the mortgage. As plaintiff's name was on the note he was the only person not placed in *statu quo* by the rescission, but of this defendants cannot complain.

3. **———: Tender.** Where plaintiff rescinded promptly and was anxious that defendant take the land back and offered to deed it to them, but was told by them they would not take it but would hold him to the trade, it was not necessary for him to go to the expense of executing a deed and make a formal tender of it before bringing suit.

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4. **EVIDENCE: Value of Property: Witness Not Shown to be Qualified.** It was not reversible error to permit plaintiff to testify as to the value of a farm even though he had not shown himself qualified, in view of the fact that the value was proved by other qualified witnesses and no testimony as to value was offered by defendant, and it was not material to plaintiff's right to recover whether the farm was valued at plaintiff's estimate or at that placed on it by the witnesses who were qualified.

5. **PRACTICE, TRIAL: Argument: Jury.** No error is committed by the court in forbidding counsel, in the argument to the jury, to make statements which were merely an incorrect exposition of the legal effect that would follow a verdict for plaintiff.

6. **FRAUD AND DECEIT: Representations: False and Fraudulent.** Representations made as positive statements of fact, by one of three owners of a tract of land, are not relieved of their false and fraudulent nature by the fact that the person making the representations had never seen the land and so informed plaintiff, because the former immediately referred the latter to one of the other landowners as one who had seen it and he, in the presence of the other, made similar representations. In such case the representations of one were those of all. And as plaintiff had no opportunity to see the land before the trade, he had a right to rely on the representations, since they were concerning physical facts, were not mere expressions of opinion and were reasonable on their face.

Error to Daviess Circuit Court.—*Hon. Arch B. Davis.* Judge.

AFFIRMED.

Hewitt & Hewitt and *Dudley & Selby* for plaintiffs in error.

W. M. Fitch and *T. B. Allen* for defendant in error.

TRIMBLE, J.—Plaintiff traded a stock of clothing to defendants for a tract of land in Oklahoma. The trade was made in DeKalb county, Missouri, before plaintiff had ever seen or had an opportunity to see the land. A few days after the trade, and after possession of the goods had been delivered to defend-

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ants, plaintiff visited the land and discovered it was not at all as represented. He immediately came back to Missouri, hunted up the defendants, told them they had falsely and fraudulently misrepresented the land, insisted upon a rescission of the contract, offered to deed the land back again and demanded the return of his goods. Defendants refused to even entertain such an idea and promptly and repeatedly informed plaintiff they would not take the land back but would hold him to the trade. Thereupon plaintiff brought replevin for the goods on the ground of false and fraudulent representations. A trial resulted in plaintiff's favor and defendants have brought the case here by writ of error.

Their chief complaint is that the court should have sustained a demurrer to the evidence because of the alleged failure on the part of plaintiff to plead and prove a rescission on his part and a formal tender of a deed to defendants conveying the land back to them. There are other errors claimed but they will be noticed later.

So far as the pleading is concerned we think the petition is amply sufficient and contains all the allegations required in this kind of a case. It is true, in alleging that plaintiff rescinded the contract, the petition does not use the word "rescinded," but it does state facts from which a rescission follows as a legal consequence.

As to the proof in regard to rescission and tender on the part of the plaintiff, the evidence is clear that plaintiff rescinded the contract promptly and unqualifiedly and demanded a return of his goods. Plaintiff, however, did not go through the formalities of executing a deed to defendants and presenting it to them before bringing the suit. And it is on this that defendants' demurrer is really based. But the undisputed evidence shows that, although plaintiff was anxious to have them take the land back and expressed a present

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readiness and fixed intention to deed it back to them, they announced to him their firm and unalterable determination to hold him to the trade and their absolute and final refusal to receive the land from him under any circumstances. This made it useless and vain for him to go to the expense and trouble of executing a deed and proffering it to them, and had he done so, it would have been wholly unavailing. In such case the formal tender of an actual deed is unnecessary, made so by act of the very parties who now insist that a tender should have been made. [Woods v. Thompson, 114 Mo. App. 38; Enterprise Soap Works v. Sayers, 55 Mo. App. 15.]

There was no error, sufficient to reverse the case, in permitting plaintiff Manning to testify as to the market value of the Oklahoma land. Other witnesses in his behalf, who lived near it and who were undoubtedly qualified, said it was worth $1800. Manning put it at $1500. The other side offered no testimony as to its value; and whether the land was worth $1800 or $1500 did not affect the issues involved, since, if plaintiff was otherwise entitled to recover, he would do so regardless of whether it was worth one or the other sum. Besides, he said he was acquainted with its market value and this, satisfying the trial judge, was sufficient in the absence of evidence showing that he did not know its value.

Nor did the court err in sustaining the objection to certain statements made to the jury in argument. The statements objected to were not an argument on the *facts,* but an incorrect exposition of the *legal effect* that would follow a verdict for plaintiff.

The refusal to admit in evidence the fire insurance policy for $1000 was proper. The purpose of the offer was to prove the value of the house by the amount of the policy. The policy could have had no such effect, but even if it could have so had, defendants were al-

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lowed to prove orally that there was $1000 insurance on the house.

The testimony of the plaintiff, if believed by the jury, was ample to show that false and fraudulent representations were made; that they were made for the purpose of deceiving plaintiff and inducing him to trade; that they did induce him to trade; that he relied on them and had a right to do so and in fact could not have done otherwise and traded. The contention is made that because one of the defendants, in representing said land, told plaintiff he had never seen the land but had only learned about it from others, therefore, the representations were not false or fraudulent and plaintiff had no right to rely on them. But the land was owned by all three of the defendants, and although one of them did, after making a number of representations concerning the land, casually remark that he had never seen it, yet he made his representations as positive statements of fact and called in one of the other owners as one who had seen the land, and the latter then and there said he had seen it and made practically the same representations, so that the representations of one were those of both. The representations were concerning physical facts and conditions, not mere expressions of opinion. They were reasonable on their face and led plaintiff to make the trade. He had no opportunity to examine the farm, but relied on what the defendants told him of the farm. It was shown by unquestioned and disinterested witnesses that the farm was not anything like it was claimed to have been represented. All these were matters for the jury to pass upon and they did so adversely to the defendants who are plaintiffs in error here.

The point that plaintiff Manning could not rescind because he could not place the defendants *in statu quo* is not well taken. He had given a mortgage for $2100 on the land it is true, but it was for money owed by defendants, and every cent of it was used in paying

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their debts. Defendants were going to make the deed of trust themselves, but when the trade was arranged, it was agreed that, for convenience, plaintiff would execute it after he got the land rather than take the land subject to the mortgage. Plaintiff's name being still on the note, *he* is the only one not able, perhaps, to regain his status; but of this defendants are in no position to complain.

The objections to the instructions given by the court for plaintiff are not well taken. We have examined them carefully and think that, as a whole, they present the law fairly and clearly to the jury. No error is found in the refusal of the court to grant defendants refused instructions since they either contained something objectionable or were unnecessary, because amply covered by other instructions for defendant which were given. Finding no error, our duty is to affirm the judgment. So ordered. All concur.

H. F. HURXTHAL, Respondent, v. J. R. DALBY, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **REAL ESTATE BROKERS: Exchange: Procuring Cause.** An owner of a grocery store in Missouri authorized a real estate agent to notify him when he found a suitable farm for exchange for the store. The agent found that another agent had advertised a farm in Oklahoma for exchange and notified the owner of the store. They went together to see the other agent and found that that farm had been sold and could not be had. The owner testified that that ended any connection or relation between them; and that afterwards this agent to whom he had been thus introduced found a farm in Missouri which he traded for the grocery store and forty acres of land, and that the first agent had no knowledge of or connection with the trade. It was *held* that, if the jury believed this evidence, a verdict should have been returned for the owner of the store, and instructions submitting such hypothesis should have been given

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2. ———: ———: ———: **Two Agents: Introduction.** The mere fact that one agent introduces a person to another agent to secure a trade for a certain farm in the latter's hands which it is ascertained cannot be had, will not entitle such agent to a commission for a trade for another farm made through the second agent, with which trade the first had nothing to do.

Appeal from Jackson Circuit Court.—*Hon. E. C. Hall*, Special Judge.

REVERSED AND REMANDED.

Chapman & Hanger for appellant.

(1) Even though a broker brings the parties together and starts them to negotiating, but the property the broker was authorized to exchange could not be exchanged and never was made, and a variance both in property and price was made in the deal that was consummated, and the broker had nothing to do with such deal and did not even know it was under consideration, then he neither found the customer nor made the exchange, and is not entitled to a commission. Tooker v. Duckworth, 107 Mo. App. 231; Duncan v. Hills, 155 Mo. App. 702; Blackwell v. Adams, 28 Mo. App. 61; Yoder v. White, 75 Mo. App. 155; Warren v. Cram, 71 Mo. App. 638; 19 Cyc. 251. (2) The broker must have been authorized to make the exchange made, and have been the procuring and efficient cause of the exchange —and that even though he may find a customer with whom the owner closes a deal. Crowley v. Somerville, 70 Mo. App. 376; Ramsey v. West, 31 Mo. App. 676; McCrary v. Kellog, 106 Mo. App. 597.

Scarritt, Scarritt, Jones & Miller for respondent.

ELLISON, P. J.—Plaintiff is a real estate agent and he claims to have traded a stock of groceries owned by defendant for a farm, and that defendant employed him to do so, but refuses to pay him a commission for

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the service. The judgment in the trial court was for the plaintiff.

The evidence in plaintiff's behalf tended to show that defendant authorized him to procure a trade of his, defendant's, grocery store in Kansas City for a farm. That shortly afterwards he saw a farm in Oklahoma advertised for trade by one Middleton, an agent in Kansas City. That he wrote to defendant that possibly a trade could be made for this farm. That thereupon defendant came to his office and they went together to Middleton's office and talked of the Oklahoma farm. It was arranged that Middleton should telegraph to Oklahoma to see if a trade was desired. Before leaving some other farms were talked of, though nothing was said concerning a trade. They left Middleton's office together, without hearing from Oklahoma. They separated, defendant stating he would come to plaintiff's office that afternoon, but he did not do so and plaintiff never saw him or communicated with him afterwards until he brought this action. The evidence in plaintiff's behalf further tended to show that he afterwards learned that defendant, through Middleton, traded his grocery store and forty acres of land in Benton county, Missouri, for a farm of two hundred and forty acres in Newton county, Missouri.

The evidence in defendant's behalf tended to show that the farm he traded for in Newton county was never considered or mentioned in connection with plaintiff, and that plaintiff knew nothing of there being such a farm. That the trade for that farm was made solely through Middleton after it was ascertained the farm in Oklahoma, which plaintiff recommended and was endeavoring to secure for the trade, could not be had and the matter had been dropped.

On this evidence the court refused two instructions declaring, in effect, that defendant had a right to sell or trade his stock of goods for himself and that if he

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did so without assistance from plaintiff and plaintiff did not secure the purchaser, he could not recover.

These instructions should have been given, though it would perhaps have been better to omit the word "even" in the second one. Plaintiff did not have the exclusive agency for sale or exchange of the goods. There was not suggestion in the agreement between him and defendant that he should be remunerated even though he did not bring about the trade.

The court gave an instruction something in line with those refused, which is perhaps the reason for their refusal. But we think, under the circumstances developed in evidence, those refused were proper to explain and make clear the general expressions of plaintiff being the active and procuring cause.

In view of a retrial of the cause we will add that it being ascertained the Oklahoma farm, which plaintiff endeavored to secure, could not be had, it ended plaintiff's connection with defendant, unless the latter expressly or impliedly entered into further relations with him for a trade for the farm finally secured. The mere fact that plaintiff introduced defendant to an agent for the purpose of trading for the Oklahoma farm, would not justify plaintiff in claiming a commission for some other trade made with that agent with which plaintiff was not connected.

The judgment is reversed and cause remanded. All concur.

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W. E. MUIR, Respondent, v. MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 17, 1913.

1. **CARRIERS OF STOCK: Delay in Shipment: Evidence.** A showing of mere delay and nothing more is insufficient to support a recovery of damages for delay in the transmission of live stock. But when the delay is shown under such surroundings as to raise even a slight inference that the delay had its origin in negligence, this is sufficient, especially in the case of an unaccompanied shipment, and the knowledge of what caused the delay is with the carrier and not the shipper.

2. ———: ———: ———: **Inference of Negligence.** Where, in addition to the delay, it was shown that there were no accidents or trouble of any kind, that the route was clear and open, no washouts, wrecks or breakdowns, that the trains ran when they did run, without a hitch of any kind, this was sufficient to raise an inference of negligence.

3. ———: ———: **Actionable Damages.** Where the petition does not declare upon a failure to reach a certain market but upon the loss sustained by reason of the difference in flesh and condition of the animals on arrival from that in which they would have been had no delay occurred, the measure of damages is the difference in the market value of the animals in one condition from their market value in the other. This is true, as to the loss on account of the condition of the animals, whether they are shipped to market or held for some other purpose.

4. ———: ———: ———: **Question for Jury.** In this case whether the animals were diminished in value by the delay and if so, the amount of the loss sustained thereby, are questions for the jury, not for the appellate court.

Appeal from Callaway Circuit Court.—*Hon. David H. Harris*, Judge.

AFFIRMED.

D. W. Herring and *Lee W. Hagerman* for appellant.

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C. M. Hay, J. W. Tinchner and *H. N. Eversole* for respondent.

TRIMBLE, J.—Suit to recover damages for negligent delay in the shipment of forty-eight head of mules from Windsor to Fulton, both in Missouri. The route of shipment over defendant's line is from Windsor northeast to Sedalia twenty miles away, then from Sedalia east sixty miles to North Jefferson. From this last point to Fulton, a distance of twenty-five miles, the shipment went over the Chicago & Alton road, defendant having no line to Fulton.

The ordinary and usual time required to transport a shipment from Windsor to Fulton was twenty-four hours or less. The shipment in this case occupied something over fifty-two hours. It started at Windsor at 2 p. m. August 15, got to Sedalia at 6:10 p. m. that day, going a distance of twenty miles in four hours and ten minutes. At Sedalia the mules remained from 6:10 p. m. of the 15th to 10:15 a. m. of the 16th, a period of sixteen hours and five minutes. During this period they were watered and fed in the pens. At 10:15 of the 16th the mules were started to North Jefferson and arrived there at 4 p. m. of that day, travelling sixty miles in five hours and forty-five minutes. There was only one freight train a day from North Jefferson to Fulton and its time for leaving North Jefferson was one o'clock, although frequently it left later than that; and on this particular day it left at 2:30. As the mules arrived at North Jefferson at four o'clock, of course the train for Fulton had gone, so the defendant fed and cared for the mules at Mokane until the next day, the 17th, and then delivered them to the Chicago & Alton, which took them on to Fulton, arriving there between sundown and dark, August 17, something over fifty-two hours from the time they started from Windsor. After failing to reach North Jefferson in time to catch the Fulton train on the 16th, the delay at

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North Jefferson, or Mokane where the mules were cared for, was unavoidable. The mules were sent on to Fulton on the first train thereafter, and no complaint is made because the mules were cared for at Mokane. If the mules had arrived at North Jefferson two hours earlier than they did, there would have been no delay at North Jefferson, since the one o'clock train did not leave that point for Fulton until 2:30 p. m. on the 16th. So that, unless there was negligent delay before the mules reached North Jefferson, the defendant is not responsible for the delay occurring thereafter.

The defendant offered no evidence but stood upon its overruled demurrer to plaintiff's evidence. Plaintiff recovered and defendant appeals, its main contention being that there is no evidence showing a negligent delay. Undoubtedly a showing of mere delay and nothing more, neither negligent acts causing it nor other circumstances tending to raise even a slight inference of negligence, is insufficient to support a recovery. In this case no specific *acts* of negligence are alleged or shown. But the question is, has the delay been shown with such circumstances and under such surroundings as to raise the inference that the delay had its origin in negligence? From the very nature of the relation of carrier and shipper, circumstances that even slightly tend to show this are sufficient, especially where the knowledge of what caused the delay is with the carrier and not the shipper. [Bushnell v. Railroad, 118 Mo. App. 618, 627; Gilbert v. Railroad, 132 Mo. App. 697, 764. If, therefore, such circumstances and surroundings have been shown in this case, plaintiff is entitled to recover.

Defendant received the mules for shipment from Windsor to Fulton. It therefore became bound to so transport them as to enable them to reach their destination in reasonable time. A reasonable time theretofore had been, and thereafter was, twenty-four hours

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or less on shipments starting in the afternoon as this one did. Defendant knew that there was but one freight a day from North Jefferson to Fulton and that its leaving time was one o'clock. The regular east-bound freight from Sedalia to North Jefferson arrives at the latter place between three and four in the afternoon and is, therefore, too late for the Fulton train. So that whenever freight was to be sent from Sedalia to connect with this Fulton train, defendant sent out No. 116 as an extra. It was made up at Sedalia and ran on special orders. Its evident purpose was to catch the Fulton train. The delay at Sedalia from 6:10 in the evening till 10:15 in the morning of the next day, a period of sixteen hours and five minutes, was shown. The train started from Sedalia with the mules at 10:15 two and three fourths hours before the time the Fulton train was due to leave, so that it had only this length of time to go sixty miles, a run which on this occasion required nearly six hours. Now, shipments made from Windsor to Fulton both before and after this, and starting at the same time in the afternoon, had reached Fulton within twenty-four hours. So that in those shipments there was either less delay at Sedalia or less delay in going from Sedalia to North Jefferson, much less in fact, because Fulton was twenty-five miles further on than North Jefferson. And while it required only twenty-four hours or less to get to Fulton in all other shipments, yet it took twenty-six hours for this shipment to get as far as North Jefferson. So that unquestionably there was unusual delay. Was it under such circumstances as tended to exclude every hypothesis except that of defendant's negligence? It was shown that there were no accidents or trouble of any kind on the road; that the route between Windsor and North Jefferson was clear and open, no washouts or breakdowns, no difficulty of any kind; that the trains ran, *when they did run,* without a hitch of any kind;

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and all of this was shown by the agents and operatives of the defendant. The plaintiff knew nothing of what occurred on the way as he did not accompany the mules nor did any one for him. It would seem that a delay occurring under this state of facts would be sufficient to raise an inference that negligence was the cause thereof.

Appellant's point that there was a failure to prove actionable damages cannot be sustained. The petition does not declare on a failure to reach a certain market. but upon the loss sustained by reason of the difference in the flesh and condition of the mules on arrival from that in which they would have been had no delay occurred. To get at this loss it is necessary to show the difference in the market value of the mules in one condition from their market value in the other. In doing this the term "market value" is used in contradistinction to the value peculiar to the owner; and not because the property damaged is to be immediately sold on the market. The above is the correct rule whether the property is shipped to market or held for some other purpose. [New York, etc., Railroad Co., v. Estill, 147 U. S. 591.] In this case, at pages 616 and 617, the Supreme Court of the United States say: "The difference between the market value of the cattle, in the condition in which they would have arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of such negligence, they did arrive, constituted the proper rule of damages. It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market. The depreciation in value of the cattle was the same in either case."

The contention is made that this difference in value was only temporary. This makes it none the less a loss. Plaintiff did not claim the mules were permanently injured but that they were so set back in

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condition and flesh as to require him to feed them at least a month and perhaps longer to bring them back to the condition they should have been in on arrival at Fulton. His loss in doing this was permanent though the deteriorated condition of the mules was temporary. Whether plaintiff was thus required to longer feed and care for the mules on account of their reduced condition caused by the delay is for the jury to say, not this court.

Judgment affirmed. All concur.

WILLIAM POPINEAU, Respondent, v. WAVERLY BRICK & COAL CO., Appellant.

Kansas City Court of Appeals, February 17, 1913.

INSTRUCTIONS: Common Error: Estoppel. Where an instruction for plaintiff in an action for personal injury assumes negligence in the proprietors of a coal mine, and assumes the roof of the mine was not reasonably safe, it is error. But if defendand by its instruction also assumes these things, it cannot complain on appeal.

Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

Cowherd, Ingraham, Durham & Morse and *Hale Houts* for appellant.

Alexander Graves, Chas. Lyons and *C. R. Ristine* for respondent.

ELLISON, P. J.—Plaintiff was an employee of defendant in one of its coal mines and was injured therein. He charges the injury to defendant's negligence and brought this action for damages. He recovered two thousand dollars.

Plaintiff's injuries were occasioned by portions of the roof over its entryway falling upon him. There

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is but a single objection made to the judgment, and that is directed to instruction No. 2 given for plaintiff. It sumits certain hypotheses and directs a verdict if they are found to be facts. The objection made is that it is so worded as to assume the roof was not reasonably safe. That is the ground of the objection, though there are comments which attempt to enlarge it somewhat.

It may be conceded that the instruction has the technical fault stated by defendant, but it is of no avail since defendant by its own instruction confessed the truth of the matter assumed. In its instruction No. 3, it directly adopts the fault in plaintiff's, and thereby cures it. [Riggs v. Met. St. Ry. Co., 216 Mo. 304, 318, 319; Phelps v. City of Salisbury, 161 Mo. l, 14.] In the first of these cases the plaintiff's instruction assumed it to be the duty of the defendant's servants to look ahead. An instruction for defendant is then quoted and the court said of it: "The duty to look ahead is assumed in that instruction. Its theory was the theory of plaintiff's instructions. Hence if error at all, it was common error. That common error is not reversible error is not to be gainsaid."

In the other case the court, speaking of an instruction, said: "This instruction was therefore unwarranted by both the pleadings and the evidence and, but for the fact that defendant by its fifth and sixth instructions in substance adopted the same theory, the judgment would have to be reversed, but a party will not be heard to complain of an error which he invites or adopts." Cases abound stating the same rule.

There is no merit, under the evidence, in the suggestion that the instruction failed to require notice of the defect. Besides, that was fully covered by defendant's instructions, especially No. 6.

Finding no error materially affecting the merits, it becomes our duty to affirm the judgment. All concur.

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THE FRED W. WOLF COMPANY, Appellant, v. HERMANN SAVINGS BANK et al, Respondents.

Kansas City Court of Appeals, February 17, 1913.

1. **EQUITY: Purchase Price: Personal Property.** When the purchase price of personal property is unpaid the intention of the parties to the contract of sale will be given controlling effect unless the property be of such nature that necessarily it becomes incorporated into the realty by the act and manner of annexation.

2. **———: Conditional Sale: Prior Mortgage.** A conditional sale of machinery put into a plant covered by a prior mortgage, will be enforced in the face of the opposition of the mortgagee where such machinery may be removed without substantial injury to the freehold, or to the security the mortgagee had at the time such addition was made to the plant.

3. **———: ———: Impairment of Security.** Conditional sales are given full effect as against the interest of prior mortgagees where by so doing the security of the mortgage is not diminshed.

4. **CONTRACTS: Sale of Real Estate: Foreclosure.** In contracts of sale of real estate by title bond a decree for the contract price and for foreclosure may be had.

Appeal from Gasconade Circuit Court.—*Hon. R. A. Breuer*, Judge.

REVERSED AND REMANDED.

Scott, Bancroft & Stephens, and *Robt. Walker* for appellant.

J. W. Booth and *August Meyer* for respondents.

JOHNSON, J.--This is an action in equity brought by the vendor of personal property to enforce a lien for the unpaid portion of the purchase price. The defendants are the Hermann Brewing Company, the vendee of the property, and the Hermann Savings

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Bank. The real contest is between plaintiff and the bank and the principal point in issue is whether or not plaintiff is entitled to a lien as against the bank which claims to be the owner of the property. This issue was resolved by the circuit court in favor of the bank and the cause is here on the appeal of plaintiff.

The Kropp Brewing Company, a corporation, owned and operated a brewery in Hermann and became indebted to defendant bank in the sum of $12,000. It secured the payment of the indebtedness by a deed of trust on the land and improvements constituting the brewery plant and the deed of trust was duly recorded. Afterward the corporation changed its name to the Hermann Brewing Company and continued the business of operating the brewery. A part of the equipment of the brewery was the refrigerating machinery and, concluding that the successful prosecution of the business required the installation of new machinery in place of the old, the brewing company, without notice to the bank which still held the unsatisfied deed of trust, entered into a contract in writing with plaintiff, a manufacturer of such machinery, to install a new refrigerating plant in the brewery for $3580. The contract required plaintiff to furnish on board cars at Hermann "one refrigerating plant of twenty tons ice melting capacity daily consisting of the following machinery and material, all as hereinafter specified in detail." Then follows an enumeration and specification of the different parts of the machinery and appurtenances which in the aggregate constituted a complete refrigerating apparatus. The contract specified that "all foundations, masonry and carpenter work for compressors, engines, pumps, tanks, condensors, scaffolding, etc., and all holes for pipes to pass through walls or floors are to be made by the purchaser."

As we interpret the contract and understand the evidence the duty was imposed on the brewing com-

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pany of preparing the place for the installation of the apparatus in a manner that would enable plaintiff to make the necessary emplacements and attachments without disturbing the soil or the buildings. In the work of preparation the brewing company removed the old machinery and put the foundations for the engine, boiler, etc., in such condition that they could be and were fastened to their foundations by merely screwing nuts on imbedded bolts and the apparatus was connected with the remainder of the brewing plant by screwing pipe ends together. In short the installation was so made that the apparatus could be detached by unscrewing some nuts and pipes and removed from the premises without changing or disturbing the condition they were in at the installation of the new apparatus.

The contract provided that "all property rights in this plant shall remain in us (the vendor) until after all money payable hereunder shall have been paid to us in cash." The contract was duly executed and acknowledged by the brewing company and was filed for record in the office of the recorder of deeds. Afterwards the machinery was delivered by plaintiff and placed in the brewery. The brewing company made payments on the purchase price reducing the indebtedness to about $600, and then made an assignment for the benefit of creditors. Later the brewery was sold under the deed of trust held by the bank and the bank became the purchaser at that sale.

The assets of the brewing company have been distributed among its creditors and plaintiff received $106.06 from the assignee on its demand. The present suit is to enforce the remainder of the debt as a lien on the refrigerating plant. The bank claiming that the property when installed in the brewery became a part of the realty covered by the deed of trust denies the right of plaintiff to such lien.

We do not understand plaintiff as claiming a right to a lien under the mechanic's lien statutes but as

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founding the right on the terms and provisions of a conditional sales contract, i. e., a contract in which the vendor of personal property reserves title in himself until the payment in full of the purchase price. The mutual intent of plaintiff and the brewing company to enter into a contract for a conditional sale not only is clearly expressed in the contract of sale but also is manifested by a careful observance of all the requirements of the statutes relating to such contracts. The contract was acknowledged and recorded as provided in cases of mortgages of personal property for the purpose of giving notice to subsequent purchasers and creditors of the vendee. So far as the mutual intention of the contracting parties may be allowed to control the interpretation of the contract and the ascertainment and enforcement of the respective rights and duties of the parties thereunder, the contract should be regarded as one that, between the parties, preserved the character of the property as personalty and reserved the title in the vendor as long as any part of the purchase price should remain unpaid.

And in such cases the intention of the parties to the contract will be given controlling effect unless the property be of such nature that necessarily it becomes incorporated into the realty by the act and manner of annexation. "Thus if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty, notwithstanding their annexation." [Patton v. Phoenix Brick Co., 150 S. W. 1116, 167 Mo. App. 8.]

But we said further in the case just cited: "When chattels are of such a character as to retain their identity and distinctive characteristics after the an-

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nexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, or destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement. Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold." [Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.] The same rule is announced substantially in Edwards & Bradford Lumber Co. v. Rank, 57 Neb. 323, 77 N. W. 765, 73 Am. St. Rep. 514.

Applying this rule we do not hesitate in saying that since the annexation in the present case was not of a character either to destroy or impair the identity of the refrigerating apparatus, and since its removal from the brewery could be made without appreciable change or alteration in the condition of the realty obtaining at the time of its installation, we perceive no reason for pronouncing ineffective the clearly and unequivocally expressed intention of the parties that the title of the machinery should remain in the vendor until payment of the purchase price and that there should be no conversion of the property from personalty to realty. Such being the character of the transaction as between the original parties we do not think the defendant bank which stands in the position of the holder of a prior mortgage has any ground on which to base its assertion that as to its interest the machinery must be treated as realty. The rule now generally

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recognized is that a conditional sale of machinery put into a plant covered by a prior mortgage will be enforced in face of the opposition of the mortgagee where such machinery may be removed without substantial injury to the freehold or, to express it differently, without substantial injury to the security the mortgagee had at the time of such addition to the plant. [Insurance Co. v. George, 79 N. W. (Minn.) 1028; Woods v. Manufacturing Co., 13 So. Rep. 948; Manufacturing Co. v. Water Co., 48 Fed. 879; United States v. Railroad, 12 Wall. 362; Warren v. Liddell, 20 So. Rep. 89.] We quote with approval the following excerpt from the first of the cases cited:

"The title to the property, then, not having been devested by the terms of the contract, nor by the performance of the terms thereof, as between the parties, the question arises as to the rights of the plaintiff mortgagee as against the rights of the defendant George, the assignee of the rights of the Hercules Ice-Machine Company. Appellant claims that George cannot legally remove the machinery without consent of the mortgagee. Why not? It was not there when plaintiff loaned its money and took security on the premises for its repayment. It was not there when the fifteen ton plant was installed in place of the natural refrigerating system. It was not installed in the building until several years after the date of the mortgagee's loan on the premises. It parted with no security or consideration on the faith that this sixty-ton plant would be installed or remain there. It is not an innocent holder of a mortgage, taken without notice, upon land to which the owner had affixed property, personal in its character, before the execution of the mortgage. It has no equities which it can invoke in its favor, for the installation of the fifteen-ton plant added materially to the value of the security which it took when it loaned the money to Patterson in the first instance. The question, then, is purely one

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of law, viz., which has the superior rights, the plaintiff or the defendant George? At the time when the sixty-ton plant was installed in the building, the Thurston Company reserved the right to remove the machinery in case of nonpayment of the purchase money. There is no pretense that such money has been paid, and there is no contention but what the Thurston Company agreed that the Hercules Com pany might remove the property in case of nonpayment of the purchase price of the machinery. In the case of Bank v. Stanton, 55 Minn. 211, 56 N. W. 821, this court held that, where buildings are erected by one having no interest in the land on which they stand, an agreement will be implied that the buildings shall remain the personal property of him who erects them,—especially in the absence of any other facts or circumstances tending to show a different intention,—and that, where the land is subject to a mortgage, if the agreement of the mortgagor in possession and the party erecting the building was that it should remain the personal property of the latter, the absence of a concurrent agreement on the part of the mortgagee to the same effect will not, of itself, make the building a part of the mortgage security. It seems to us that the rule here laid down controls the case at bar. There can be no material distinctions between a building apparently affixed to the land, and that of a refrigerating plant so affixed."

Why should the defendant bank be allowed to ignore the rights the contract guaranteed to plaintiff and to appropriate property the title to which never passed to the brewing company, the mortgagor? The bank did not lend its money on the security of plaintiff's property; the installation of that property, instead of injuring the bank's security, benefited it to the extent of the payments made by the brewing company on the purchase price, the usefulness of the old refrigerating apparatus had come to

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an end and its replacement had become a necessity to the preservation and conservation of the bank's security and it would seem that to allow the bank to keep this property as freed from plaintiff's claim would be to give one man's property to another in defiance of the plainest demands of reason and justice. The tendency of the modern decisions is to give full effect to conditional sales as against the interests of prior mortgagees where by so doing the security of the mortgage is not diminished. (13 Am. & Eng. Ency. of Law (2 Ed.), 630; Campbell v. Roddy, 44 N. J. Eq. 244; Binkley v. Forkner, 117 Ind. 185; Hurzthal v. Hurxthal, 32 S. E. Rep. 237) and to adjust the rights of the parties on equitable principles even in instances where the severance and removal of the machinery might impair the security of a prior mortgagee to some extent. The old rule that whatever is annexed to the freehold becomes a part of it has been greatly relaxed to meet the exigencies of modern trade and industry.

We conclude that as between plaintiff and defendant bank the title to the refrigerating system remained in plaintiff and that plaintiff had the option of pursuing its remedy at law for the recovery of the property, or, treating the unpaid purchase price as a lien on the property, might sue in equity for the enforcement of the lien. [Hollenburg Music Co. v. Morris, 35 S. W. 396; Campbell Co. v. Powell, 14 S. W. Rep. 245; In re National Cash Register Co., 174 Fed. 587; 35 Cyc. 708; Woods Mfg. Co., 13 So. 948; Westinghouse Co. v. Railroad, 76 Atlantic, 897; 2 Story Eq. Jur., sec. 1216.]

As is said in Hollenburg v. Music Co., supra: "Apart from the statutes, there is no essential difference in such sales of personal property and of real estate. The rights and remedies of the parties are similar in both cases. [Tied. Sales, sec. 249.] It is well settled that in contracts of sale of real estate

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by title bond a decree for the contract price and for foreclosure may be had. [Jones, Mort. (5 Ed.), sec. 1449.] Equity certainly favors that remedy which inflicts the least hardship on the debtor. We, therefore, conclude that plaintiff could proceed by foreclosure on the piano for the balance due, and was not confined, if it were permissible under the facts of this case, to a judgment for the specific property."

The judgment is reversed and the cause remanded with directions to enter judgment for plaintiff in accordance with the views expressed. All concur.

CITY OF ELDORADO SPRINGS, MISSOURI, Respondent v. F. J. HIGHFILL, Appellant.

Springfield Court of Appeals, January 6, 1913.

JURISDICTION: Supreme Court. A case involving a Federal question, to-wit, a construction of the Constitution of the United States regulating commerce between States, is within the jurisdiction of the Supreme Court, and not the Court of Appeals.

Appeal from Cedar County Circuit Court.—*Hon. B. G. Thurman*, Judge.

TRANSFERRED TO THE SUPREME COURT.

Chas. E. Gilbert and *J. F. Rhodes* for appellant.

R. N. Banister for respondent.

PER CURIAM.—This case involves a Federal question, to-wit, a construction of section 8 of article 1 of the Constitution of the United States regulating commerce between States. A similar case was transferred by the St. Louis Court of Appeals and retained by the Supreme Court. [State v. Looney, 116 Mo. App. 592, 96 S. W. 316; *Id.*, 214 Mo. 216, 97 S. W. 934, 99 S. W. 1165.]

Ordered transferred to the Supreme Court for decision.

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ACME HARVESTING MACHINE CO., Appellant v. J. M. GASPERSON and P. E. GASPERSON, Respondents.

Springfield Court of Appeals, February 3, 1913.

1. **PROMISSORY NOTE: Defenses.** In a suit on a promissory note for the purchase price of a binder it was permissible for the defendant to plead both a failure of consideration and also a breach of the warranty as a counterclaim, where the same were not inconsistent.

2. **———: Failure of Consideration.** The plea of failure of consideration goes only to the extent of the purchase price and the proof is confined to showing that the machine did not measure up to the terms of the warranty, express or implied.

3. **———: Breach of Warranty as Counterclaim.** As a counterclaim the recovery may be had for a greater or less amount than plaintiff's claim and the pleading and proof would extend to special extraneous damages.

4. **WARRANTY: Express and Implied.** Either an express or implied warranty may be the basis of a failure of consideration.

5. **———: Implied Warranty.** An implied warranty always appertains, in the absence of an express warranty to the same effect or inconsistent therewith, that an article sold for a special purpose is suitable for that purpose.

6. **———: Express Warranty: Conditions Precedent.** An express warranty, which imposes conditions precedent, supersedes a like or inconsistent implied warranty and to render it available as a defense, performance of conditions precedent thereto annexed must be alleged and proven.

7. **IMPLIED WARRANTY: Breach: Not Necessary to Return Article nor Notify of Defects.** Under an implied contract of warranty the purchaser is not bound to return the property should it fail to measure up to the warranty, nor must he give notice of the defect. He may continue to use it in the defective condition without losing his defense. In such a case the defense goes only to a part failure of consideration if the machine is of any value for any purpose or if it may be repaired.

8. **WARRANTY: Equivalent Expressions In.** A special warranty on a machine "of doing good and efficient work for which it is intended" is equivalent to the implied warranty to the same effect.

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9. **INSTRUCTIONS.** In an instruction purporting to cover the entire case it is not necessary to submit every disputed evidentiary fact arising in the case, even though the same be pleaded. It is only necessary to submit the essential facts warranting a recovery and not omit the essential facts which would defeat such recovery, and vice versa.

10. **VERDICT: Finding of Jury: When Conclusive.** The finding of a jury on any fact, where there is substantial evidence to support it, makes that fact conclusive on the appellate court.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. David E. Blair*, Judge.

AFFIRMED.

R. A. Mooneyham and *Hugh Dabbs* for appellant.

1. By terms of the written contract and warranty between plaintiff and defendants, it is shown that defendants purchased the machine in controversy with a special warranty, containing conditions precedent before any liability should attach to plaintiff on account thereof. Defendants failed to comply with the conditions of the contract and warranty, and kept and used the machine after the time therein provided. This failure, by the terms of the contract, served as an agreement on defendants' part that the machine fulfilled the warranty. Bank v. Barts, 130 Mo. App. 635; Smoke Co. v. St. Louis, 205 Mo. 239; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299; Kingman Co. v. Schulenberger, 64 Mo. App. 556; Esterly v. Campbell, 44 Mo. App. 622; Boyer v. Neel, 50 Mo. App. 26; Draper v. Farris, 56 Mo. App. 418; Nichols v. Larkin, 79 Mo. 264. 2. There is no evidence that defendants complied with all the terms of the contract and warranty, and defendants do not claim a waiver of these terms by plaintiff. The burden of proof to show full compliance with these conditions, or a waiver thereof by the plaintiff, is on the defendants. Bank v. Barts, 130 Mo. App. 638; Nicols-Shepard Co. v. Rhoadman, 112 Mo.

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App. 308; Nicols v. Larkin, 79 Mo. 264. 3. The sale became complete on the failure of defendants to comply with the terms of the contract and warranty, and plaintiff's right of action accrued on the failure of defendants to give notes at the time specified in the contract. This is not altered by the fact that the notes were subsequently executed and delivered to plaintiff, and the measure of damages is the face of the notes. Globe Co. v. Doud, 47 Mo. App. 451; Autman & Co. v. Daggs, 50 Mo. App. 289. 4. The measure of damages under this supplemental agreement (if it has any value) is the reasonable cost of remedying the defects specified, or the difference between the market value of the machine as warranted and its value as it was. Kerr v. Emerson, 64 Mo. App. 160; Machine Co. v. Heath, 65 Mo. App. 461. 5. An instruction purporting to cover the entire case and authorizing a recovery on the facts hypothecated, must not exclude from the consideration of the jury any of the evidence offered by either plaintiff or defendants. Boyer v. Neel, 50 Mo. App. 26; Wood Mach. Co. v. Babbst, 56 Mo. App. 431; Kingsland v. Board Bros., 60 Mo. App. 662; Tube Works v. Ice Mach. Co., 201 Mo. 61. 6. After pleading the supplemental contract, and the introduction of evidence that the machine had only a few defects which could be remedied at small cost, it was out of the question to submit to the jury the proposition that the machine was worthless for any purpose. Nicols-Shepard Co. v. Rhoadman, 112 Mo. App. 309. 7. The acceptance was an absolute bar to the defence set up in defendants' answer, and the trial court erred in refusing to instruct the jury at the request of plaintiff to consider this in arriving at their verdict, and in not including it in its instruction given for defendants, and in failing to direct a verdict for the plaintiff for the full amount sued for. Wood Mach. Co. v. Babbst, 56 Mo. App. 431; Importing Co. v. Carl, 116 Mo. App. 581.

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Henry L. Bright for respondent.

1. Whenever a promissory note shall be the foundation of an action, the proper party may prove as a defense the want or failure of the consideration, in whole or in part. R. S. 1909, sec. 1974. 2. That the plea of failure of consideration of the purchase price for personal property sold on a warranty is available as a defense, in a suit to recover such price, is the well settled law of this State. Williams v. Baker, 100 Mo. App. 288; Herman v. Merc. Co., 106 Mo. App. 438; Brown v. Weldon, 99 Mo. 564; Maugh v. Hornbeck, 98 Mo. App. 389; Miles v. Withers, 76 Mo. App. 87; Stewart v. Miles, 80 Mo. App. 24; Steel & Wire Co. v. Symons, 110 Mo. App. 47; Implement Co. v. Parmer, 128 Mo. App. 300; Fairbanks v. Baskett, 98 Mo. App. 58; Schoenberg v. Locker, 88 Mo. App. 387; New Birdsell Co. v. Reys, 99 Mo. App. 458; Bailes v. Heer, 91 Mo. App. 428; Crenshaw v. Looker, 185 Mo. 375. 3. The defenses, breach of warranty and failure of consideration, in separate counts, are not inconsistent. Implement Co. v. Leonard, 40 Mo. App. 477; Crenshaw v. Looker, 185 Mo. 375; Brown v. Weldon, 99 Mo. 564; Murphy v. Gay, 37 Mo. 535; Compton v. Parsons, 76 Mo. 535; Bank v. Burts, 130 Mo. App. 635. 4. Where goods are not of the kind or quality contracted for, or are unfit for the purpose for which they were sold, it is not necessary to return or offer to return the goods, in order to defend against an action for the purchase price on the ground of failure of consideration. Murphy v. Gay, 37 Mo. 537; Compton v. Parsons, 76 Mo. 457; Brown v. Weldon, 99 Mo. 568, 494; Sinnamon v. Moore, 142 S. W. (Mo. App.). 5. Plaintiff in the trial court raised no objection to the answer, and any objection thereto, save that it fails to state a cause of action, cannot be raised for the first time in the appellate court. R. S.

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1909, sec. 1804; Catron v. Lafayette Co., 106 Mo. 659; R. S. 1909, secs. 1804, 1816; Kinney v. Miller, 25 Mo. 576; St. Louis v. Wetzel, 130 Mo. 600; Harper v. Fidler, 105 Mo. App. 680; R. S. 1909, secs. 1815, 1816; McGlothin v. Hemery, 44 Mo. 350; Haynes v. Trenton, 123 Mo. 326; Sheehan v. Sims, 36 Mo. App. 224; Williams v. Railroad, 112 Mo. 463; Coombs v. Block, 130 Mo. 668; Edwards v. Railroad, 74 Mo. 117; Gilson v. Railway Co., 76 Mo. 282; Lingenfelter v. Insurance Co., 19 Mo. App. 252.

STURGIS, J.—This is a suit on two promissory notes for $70 each, given by the defendants in payment of the purchase price of a binder purchased by them of plaintiff. The plaintiff failed to recover and brings the case here by appeal

The petition is in the usual form and the answer admits the execution of the notes sued on. The answer is in two counts and as a defense the first count alleges that the notes were given in payment of a certain Acme Self-binding Harvester; that the harvester was bought for the purpose of cutting and binding grain; that defendants purchased the harvester upon a written and printed warranty that it would do good and efficient work for which it was intended when properly operated; that defendants properly operated said harvester, but that same would not cut and bind grain and wholly failed to work; that defendants at once notified plaintiff's agents and plaintiff of the defective condition of the harvester; that plaintiff's agents made divers efforts to remedy the defects without avail; that defendants at once offered to return said harvester; that afterward, on September 2, 1910, plaintiff agreed in writing to put said harvester in order for the next season; that defendants relied upon said agreement and were induced thereby to retain said harvester until the next season; and were thereby induced to execute and deliver the notes sued on; that de-

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fendants gave due notice to the plaintiff before the cutting season of 1911 and requested it to put said harvester in good order as agreed, but that plaintiff failed and refused to do anything whatever during that season to put it in order; that the harvester at that season again failed to cut and bind grain and defendants were compelled to abandon the same; that defendants at once offered to return said harvester to the plaintiff and that they are still ready and willing to return same, but that plaintiff refused and still refuses to receive it; that at all the times mentioned the harvester was wholly worthless for the purpose for which it was intended and for which it was purchased and was wholly worthless for any purpose whatever and still so remains; that the consideration of said notes has wholly failed and that plaintiff is not entitled to recover the same or any part thereof.

The second count is denominated a counterclaim and sets out in the same manner substantially all the allegations of the first count, inclusive of the allegation that the harvester was intended to be used and was bought for the purpose of cutting and binding grain, and that it was purchased subject to a written and printed warranty that the same would do good and efficient work for which it was intended when properly operated. It again alleges that the harvester wholly failed to comply with plaintiff's warranty to do good and efficient work for which it was intended and for which it was purchased and was wholly worthless for any purpose whatever. The only material difference between the first and the second counts is that the second count sets up in detail that defendants were damaged by the failure of the harvester to work by reason of loss of time, in being compelled to hire another binder, for extra work in helping or in trying to repair the binder, and for loss of grain by reason of its doing defective work, all in the sum of $300, for which they ask judgment.

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Plaintiff made no objection to this answer, except to object to the introduction of any evidence on the ground that the same did not allege facts sufficient to constitute a defense, the execution of the notes being admitted. This objection was overruled and at the close of all the evidence the defendants dismissed as to the second count, the court refused a peremptory instruction to find for plaintiff and the case was submitted to the jury on the first count only.

The binder in question was purchased by defendant in May, 1910, to be delivered in June thereafter. The machine was purchased on a written order which contains the following warranty and conditions:

"Any machine of our make is guaranteed 'to do good and efficient work for which it is intended when properly operated.'

"The purchaser shall have one day to give it a fair trial; should the implement then fail to fulfill this warranty, notice is to be given at once to the dealer from whom the machine was purchased, and after the dealer had used his best efforts, and should the machine still fail to fulfill the warranty, then both the purchaser and dealer are to give immediate notice to the Acme Harvesting Machine Company, at Peoria, Illinois, or their authorized general agent, under whose jurisdiction this order was written, stating wherein the machine fails to fulfill the warranty, and a reasonable length of time is to be allowed for instructions to be given, or if necessary, the sending of a person to put it in order, or to remedy the defects, if any; the purchaser rendering any necessary assistance and furnishing suitable teams, etc., when if it cannot be made to fulfill the warranty, he shall return it to the place where received free of charge, and in as good condition as when received, and a new machine will be given in its place or the notes and money will be refunded. Under no circumstances will the machine be

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allowed to be returned without an understanding and direct instructions from Acme Harvesting Company. If notice of difficulty is not received as above stated, it will be conclusive evidence of satisfaction."

The order was given through the plaintiff's local agents at Jasper, Missouri, but it appears that one Neil was present representing plaintiff at the time the order was signed and given and that he is the man who later took the defendants' notes in payment of the same, on which this suit is based.

The defendants are father and son, but as the transaction was had largely with the father, J. M. Gasperson, he will be regarded in this statement as the defendant, and where the word "defendant" is used reference is had to him.

The binder was delivered at Jasper, Missouri, at the proper time and was moved to the defendants' farm for the purpose of being used during the harvest season of 1910. The local agents sent a man to the farm for the purpose of setting up the machine and putting it in running order. The evidence shows that the machine failed to work from the start and that much difficulty was had in trying to get it to work properly on the day the man furnished by the local agents was there assisting. It is further shown that the defendants notified the local agents at once and that these agents, in person or by a man sent by them for that purpose, tried to fix the machine and get it to work properly on three or four different days immediately following.

After six or seven days of unsatisfactory work this agent Neil appeared at the farm and spent considerable time in repairing, changing and trying to adjust the machinery so as to make it work. It would seem he had no better success in this respect than the local dealers.

On July 11 Mr. Neil was at the farm and worked on the machine and the evidence shows that defendant

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at that time told him, "If he could not put it in operation, I (defendant) wanted him to tell me where to put the thing." At that time defendant signed and gave to Mr. Neil the following statement:

"Your Mr. Neil had adjusted and started the 7 ft. Acme Binder machine which I purchased from your agent, Mr. Dugan & Kaufman, at Jasper in season of 1910, and said machine works to my entire satisfaction and completely fills terms of warranty under which said machine was purchased, *at the present time.*

P. O. Jasper Signed J. M. Gasperson, Purchaser.
State Mo. Signed ————————, Operator.

"Experts and operators are required to have one of these statements signed for each machine set up or adjusted by them."

Endorsed on back as follows:

"Acme Har. Mch. Co.
"Gen. Office
"Received
"Jul. 13, 1910."

The defendant signing this instrument testified in relation thereto that Mr. Neil represented that he wanted a statement so he could show to the company that he had been there and worked on the machine; that defendant did not have his glasses and could not see to read it and that Mr. Neil replied, "I will just make a statement I have been here and worked on the machine." The cross-examination, however, shows that defendant did know something of the nature of this instrument and that at his instance Mr. Neil wrote in the words, "at the present time."

The evidence further shows that after Mr. Neil left on this occasion and it was found that the binder did not work any better than before, defendant told the local agents that the machine was not doing good work and that he wanted to return it. In the meantime the defendants had hired another binder, with which they

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did a considerable part of their work and the cutting season was about over.

On September 2 Mr. Neil was again at the defendants' farm where they were or had been trying to cut some flax, and found that the machine was not yet doing good or satisfactory work. At this time he signed and gave to defendants the following written agreement:

"In consideration of the fact that Mr. J. M. Gasperson's binder was missing bundles and breaking chain No. 42 at the close of cutting season, and that he is today making settlement for said machine, I, B. M. Neil, in the interest of the Acme Har. Co., agree to put said machine in order next season. Mr. Gasperson giving due notice to Acme Har. Co. of K. C. before cutting time.

"B. M. NEIL."

The notes which are sued on in this case were executed at that time, though dated back to correspond with the time the order was first given. The defendants say that they were induced to give these notes and to retain the machine until the next season by reason of this written agreement, and that they had offered to both Mr. Neil and to the local agents to return the binder and they had declined this offer.

On January 12, 1911, the plaintiff wrote the following letter:

"Kansas City, Mo., Jan. 12, 1911.

"J. M. Gasperson, Jasper, Mo.

"Dear Sir:—We refer to your note for $70, past due since the first day of October, 1910, about which we have had *considerable correspondence.*

"We *understand* that you claim this machine *did not work* to your satisfaction, and we are advised by our traveler, Mr. Neil, that he gave you an agreement to the effect that he would place this machine in satisfactory running order, this agreement in writing.

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"Therefore, we can see no reason why you do not take care of this note, as you hold *our* agreement that *we* will fix the machine, and we trust you will see your way clear to favor us with a check in payment of the note and very much oblige. Yours truly,

"ACME HARVESTING MACHINE CO.,
"By H. E. GILMORE, Cashier."

It further appears that on May 7, 1911, Mr. Neil wrote a letter to defendant in which he inquires about whether he should come and fix the binder so it would work satisfactorily. The plaintiff offered in evidence, without any explanation of why it did not produce the original, a copy of a letter purporting to have been written by defendant to Mr. Neil, dated May 13, 1911. Defendant denied that this was a correct copy of his letter and the court rightfully excluded it. The copy offered shows that defendants expressed great dissatisfaction with the binder they had been trying to use and the way in which plaintiff had treated them and that they needed a new binder.

It is evident that defendant had written some letter of this date, as is shown by the following letter put in evidence by the defendants.

"Cary Hotel, Bolivar, Mo., May 21, 1911.
"Mr. J. M. Gasperson, Jasper, Mo.

"Dear Sir:—I am in receipt of *your* letter of May 13 and I will say that I want to fix your binder if you want it fixed. And I suppose you would not want me to fix it until cutting time and that is the reason I wrote you.

"Now what I want to do is this. I will come when you write me and I won't leave until the binder works satisfactorily, for then we can settle that note and then the company will not write you any more duns.

"Now when you want me to come just write me and I will come. Yours very truly,

"B. M. NEIL,

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"1025 Broad St., Springfield, Mo."

There is evidence that defendant wrote a further letter some time in May in which he said that he could not designate the day they could go to harvesting, but that it would be about the tenth of June. He said he wrote this in plenty of time to give plaintiff an opportunity to come and fix the machine for the season of 1911. In this he is corroborated by the fact that plaintiff offered in evidence a copy of a letter written by defendant, and which he admitted was a correct copy, but for some reason the plaintiff withdrew the offer and did not put the letter in evidence.

The defendants further testified that plaintiff did nothing whatever towards making or attempting to make the machine do proper work during the season of 1911. That defendants tried to use it again but that it worked no better than before and that they were again compelled to hire another machine to do a large part of their work. Defendant also testified that about October 9, 1911, he wrote plaintiff a letter, addressed to it at Peoria, Illinois, in which he stated that the machine failed to do the work they guaranteed it to do; that he couldn't do anything with it; refused to pay the notes and asked them to notify him where to put the machine, and that he stood ready to comply with his contract and return the machine. He said that the plaintiff and its agents always declined to consent to his returning the binder.

The evidence shows that the trouble with the machine was that the machinery would not work; that it missed bundles every now and then and would clog up and drag down the grain. The evidence shows that the defendants lost much time in trying to fix the machine and in waiting for it to be fixed and that they lost considerable grain by its being dragged down and not properly cut.

As the defendants dismissed as to the second count of their answer and did not seek to recover more than

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enough to offset the notes sued on, the evidence in this respect is only considered as tending to show that the binder did not comply with the warranty in doing good and efficient work for which it was intended. There is no question made but that the machine was properly operated by the defendants so far as their part of the work is concerned.

OPINION.

As before noted the two counts of the answer are substantially the same as to the facts stated and are each based on a breach of the written warranty. They differ only in the relief prayed; the one pleading the facts stated in each as a failure of consideration of the notes sued on; the other pleading the same facts as a counterclaim, specifying the elements of damages and asking a judgment in excess of the amount of the notes.

The law seems to be that a defendant in a suit for the purchase price of machinery or other such articles may plead both a failure of consideration and also a breach of warranty as a counterclaim, where same are not inconsistent. [Keystone Implement Co. v. Leonard 40 Mo. App. 477, 481; Boulware v. Manufacturing Co., 152 Mo. App. 567, 576, 134 S. W. 7; s. c., 163 Mo. App. 524.]

The failure of consideration only goes to the extent of the purchase price and the proof would be confined to showing that the machine did not measure up to the terms of the warranty, express or implied. The pleading or proof may sustain only a partial failure of consideration and defeat the plaintiff's recovery *pro tanto*. [R. S. 1909, sec. 1974.]

As a counterclaim, the recovery may be had for a greater or lesser amount than plaintiff's claim and the pleading and proof would extend to special extraneous damages. [Crenshaw v. Looker, 185 Mo. 375, 387, 84 S. W. 885.]

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A failure of consideration may be based on an implied warranty as well as an express warranty; and there is always an implied warranty, in the absence of an express warranty to the same effect or inconsistent therewith, that an article sold for a special purpose is suitable for such purpose. [Boulware v. Manufacturing Co., 152 Mo. App. 567, 576, 134 S. W. 7; New Birdsall Co. v. Keys, 99 Mo. App. 458, 463, 74 S. W. 12.]

It is true, as plaintiff contends, that, where there is a special contract of warranty imposing conditions precedent, it takes the place of a like or inconsistent implied warranty and defendants cannot plead and prove failure of the implied warranty and thus escape the performance of the conditions precedent. [Boyer v. Neel, 50 Mo. App. 26, 35; Wood Machine Co. v. Bobbst, 56 Mo. App. 427.]

In the first case the court said:

"The decisions in this State, which allow this defense to be set up, allow it to be set up either where there is an *implied warranty* of the goodness of the thing sold, or where there is an *express warranty* of such goodness; but no decision allows it to be set up so as to do away with the terms of a special contract, which the parties to the sale have seen fit to make for their government in case the thing sold turns out to be defective or worthless."

In the present case the express warranty pleaded does not differ in legal effect from the implied warranty of fitness for the purpose for which sold; and the proof that will sustain one will sustain the other. The effect therefore of the express warranty in the present contract is to impose on the purchaser the conditions precedent annexed thereto and which would not be imposed on him if the defense was based on the implied warranty to the same effect. Thus, in case of an implied contract the purchaser is not bound to return the property in case the machine fails to work,

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or even to give notice of such defect, and he may continue to use it in the defective condition without losing his defense. [New Birdsall Co. v. Keys, 99 Mo. App. 458, 463, 74 S. W. 12, and cases cited.]

The effect of a failure to return or offer to return is that if the machine is of value for any purpose or may be repaired the defense avails only as a partial failure of consideration. [Brown v. Weldon, 99 Mo. 564, 13 S. W. 342; Buss v. Window Glass Co., 146 Mo. App. 71, 83, 123 S. W. 949; June & Co. v. Falkinburg, 89 Mo. App. 563.]

It follows from the above, as the plaintiff contends, that in this case, where the defense is based on the written warranty with conditions precedent annexed thereto, that defendant is bound by said conditions and to make his defense available he must prove a compliance on his part with all the conditions imposed. [Bank v. Barts, 130 Mo. App. 635, 638, 109 S. W. 1057; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299, 308, 87 S. W. 62; Nichols-Shepherd & Co. v. Larkin, 79 Mo. 264.]

If we can apply these principles correctly to the case at bar this court will reach a correct decision. And to do this we must determine whether the trial court tried the case and submitted it to the jury on instructions conforming to these principles, keeping in mind that the finding of the jury on any fact, where there is any substantial evidence to sustain it, makes that fact conclusive here.

The trial court refused to direct a verdict for plaintiff and at its instance gave this instruction:

"The court instructs the jury that under the pleadings and the evidence in this case, you will find the issues in favor of the plaintiff in the sum of $140, with interest thereon at the rate of 8 per cent from the 22nd day of June, 1910, to this date, unless you believe and find from the evidence that said machine was sold under a warranty that it would, when properly oper-

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ated, do good and efficient work for which it was intended, and that said machine was properly operated and failed to do good efficient work for which it was intended while being properly operated."

This instruction seems to eliminate all questions except that of the machine doing good work and impliedly authorizes a finding for defendants on an adverse finding of that issue; and the jury did so find.

The court gave a lengthy instruction for defendant following and requiring the jury to find the facts substantially as stated in the answer and winding up as follows:

"And if the jury further believe from the evidence that said harvester at the time and place it was purchased was wholly worthless for the purpose for which it was purchased by the defendants and that the defendants offered to return said harvester after the plaintiff had failed to put said harvester in order during the said next season, if plaintiff did so fail, or if the jury further believe from the evidence that said harvester at the time and place it was purchased by the defendants was of no value whatever for any purpose, then the jury will find the issues for the defendants."

Plaintiff contends that this instruction is erroneous in authorizing the jury to find for defendants if they found in addition to the other facts that the machine was "useless for the purpose for which it was sold;" thus ignoring, as is claimed, the fact that the defense is on a special contract of warranty and not on an implied warranty of fitness for the purpose for which sold. But plaintiff's reasoning is faulty in not recognizing that the special warranty of "doing good and efficient work for which it is intended" would be breached by proof and finding that it was "useless" for such purpose.

The same is true of the criticism of permitting evidence to show the purpose (cutting grain) for which

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the machine was sold and that it did not do that work well. This warranty clause is sufficiently broad, and is evidently designed, to cover any kind of machinery sold, as for instance, a grain drill or hay rake. Even if it is within common knowledge, and the word "binder" in the contract is sufficient in itself to show the purpose for which it was intended or purchased to be used, we cannot put the trial court in error for admitting evidence that it was purchased for cutting grain, as that is only equivalent to showing what this particular kind of a machine was intended for.

It is also claimed that the conditional warranty requires a return of the machine to the place where received in all cases where it proves permanently defective, and that there is nothing to show a compliance with the requirement; and, subordinate to this, that, as defendants alleged generally a compliance with their part of the contract, no waiver can be claimed. In this plaintiff ignores the further stipulation of the conditional warranty that, "Under no circumstances will the machine be allowed to be returned without an *understanding* and *direct instructions* from Acme Harvesting Machine Company." Under this a return without instructions from plaintiff would be set up as a failure to comply with the contract. The answer pleads that defendants offered to return the machine and could get no understanding or instructions allowing them to do so, and that plaintiff refused to receive same; and the instruction complained of required the jury to so find. It is questionable whether any return of the machine is required in the absence of instructions from plaintiff to do so; and if so required it might be and was waived.

It is also complained that defendants' instruction is wrong in allowing the jury to find for defendants provided the machine was found to be "wholly worthless for any purpose," as the evidence did not sustain any such finding. This is true; but no such test is

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necessary. Where the machine is returned or offered to be returned as in this case, then all that is necessary to be found is that it failed to do good work as a binder, that is, "did not do good and efficient work for which it is intended." It need not be "worthless" even for that purpose, much less for any purpose; and so the instruction given for plaintiff said. The error is in plaintiff's favor in that the jury had to find the machine more defective than the warranty required.

It is also claimed that the defendant by giving the written acceptance on July 11, and thereafter retaining and using the machine waived all defects and released the warranty. This acceptance was pleaded in the reply as an absolute bar to the defense of failure of consideration, and is so urged here, on the ground that the warranty is not a continuing one and being once satisfied is at an end. This would be true provided the acceptance was absolute and conclusively showed the binder to then comply with the warranty. Defendant testified that he could not read it for want of his glasses and that it was given for no such purpose. The words added "at the present time" give it a peculiar significance. Besides, the agent Neil later gave the special agreement to put the machine in order for the coming year. This acceptance was in evidence, together with the circumstances under which it was given, and was considered by the jury, without need of a special instruction telling them to do so, in determining from all the facts whether the machine did good and efficient work and was accepted by defendants as such.

It is not necessary to discuss at great length the special contract made by the agent Neil on September 9, 1910. All that defendant claims for it is, that he was thereby induced to execute the notes sued on, retain the machine and give plaintiff another chance to make the machine do good work the next season. There is some evidence that Neil was the plaintiff's

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general agent, and the order and notes were given under his jurisdiction; at least plaintiff's letter of January 12, 1911, shows plaintiff's knowledge of this agreement, acknowledges his authority and says that his agreement is "our agreement that we will fix the machine;" and plaintiff tried to induce defendants to pay the note in reliance on this agreement. The facts in this respect differ materially from those in Machine Co. v. Heath, 65 Mo. App. 461, 467.

Nor can we agree that the effect of this special contract was to satisfy the warranty given, terminate the old contract and substitute a new one, the measure of damages for breach of which is the reasonable cost of repairing the defects specified. Nor would it require at the next season the beginning anew of the process specified for determining whether or not the machine did, or could be made to come up to the warranty. There was no new machine given in place of the old one as in Kingman v. Schulenberger, 64 Mo. App. 548, 556. It more nearly continued the warranty of quality as before but without any special conditions. [New Birdsall Co. v. Keys, 99 Mo. App. 458, 74 S. W. 12; Machine Co. v. Heath, 65 Mo. App. 461.]

Some other questions are discussed by counsel and have been considered but the length of this opinion cautions us to stop here. We find that the case was well tried and affirm the judgment. All concur.

ON MOTION FOR REHEARING.

PER CURIAM.—We have held in this case that the evidence justified, and the instructions given for defendants required, the finding among other things that the defendants did give notices to plaintiff and its agents of the defective condition of the machine in question and its failure to do good work as required by the written warranty and gave it the opportunity to remedy the defect and that it failed to do so; and

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this distinguished the case from Wood Mowing and Reaping Machine Co. v. Bobbst, 56 Mo. App. 427.

It is not necessary to submit by instruction every disputed evidentiary fact arising in a case even if the same is pleaded, in an instruction purporting to cover the whole case. It is only necessary to submit the essential facts warranting a recovery and not omit the essential ultimate facts which would defeat such recovery or vice versa. The signing of the paper purporting to be an acceptance of the machine as doing good work, after it had been worked on and repaired by plaintiff, was mere evidence to be weighed in determining whether the machine did in fact then do good and efficient work and released plaintiff from further efforts and responsibility in that behalf; and it was so treated and regarded by plaintiff in its instruction No. 2 refused, telling the jury to take the signing of this acceptance into consideration in determining that fact. That fact was the ultimate one to be determined by the jury as constituting a defense, and it was not necessary or proper to either submit the evidentiary fact of the signing of the written acceptance to the jury, or to comment on it as one of the facts to be weighed in determining the ultimate fact of the machine doing good and efficient work.

The motion for rehearing is overruled.

CORA MAE JEFFORDS, Respondent, v. ISAIAH W. DREISBACH, Appellant.

Springfield Court of Appeals, February 3, 1913.

1. **WARRANTY DEED BY NUMBER: Recorded Plat or Map.** Where a lot is deeded by a certain number, which number is one of a legally platted addition to the city, the grantee has a right to rely on getting the full amount of land called for in the recorded plat or map.

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2. ———: **Covenant of Seisin: When Broken.** When the grantor is not, at the time of making the deed, in possession of part of the property described therein and has no title thereto, his covenant of indefeasible seisin is broken as soon as the deed is made.

3. **DAMAGES: Measure of: Breach of Warranty.** The measure of damages for the breach of such a covenant is the purchase price of said part with interest from the date of the deed.

4. ———: **Costs and Expenses of Litigation: Notice.** A covenantor will not be liable on breach of his warranty for the costs and attorney's fees in a litigation between the covenantee and a third party, unless the covenantee had given the covenantor explicit and proper notice of the alleged default in the title which the deed purports to convey.

5. **AGENCY: Husband and Wife: How Established.** When the husband was sent by the wife to represent her and, as her agent, gave the notice to the covenantor, the husband is permitted to testify concerning his acts with reference to what he did in the representative capacity; and such agency may be established by the husband's testimony.

6. **EVIDENCE: Demurrer to.** Defendant waives his demurrer to the evidence by introducing his own testimony, instead of standing on the demurrer, unless the demurrer is again presented at the close of all the evidence.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. David E. Blair*, Judge.

AFFIRMED.

George W. Crowder for appellant.

(1) There was no representation or covenant of quantity contained in defendant's deed to plaintiff, but the defendant deeded the property by lot numbers. Hence no breach of the covenants of seizin, even though the paramount title to the strip in question was in another. Wood v. Murphy, 47 Mo. App. 539; Adkins v. Quest, 79 Mo. App. 36; Martin v. Stone, 79 Mo. App. 309; Ferguson v. Dent, 8 Mo. 667; McCreary v. Douglas, 5 Tex. Civ. App. 539. (2) The executed deed became the final and complete contractual ex-

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pression of the parties, and the covenants in that instrument alone prescribed the measure of the rights between plaintiff and defendant; and the deed itself containing no covenant or warranty of any certain number of front feet in the lot in question, there was no breach of warranty. Smith v. Boroff, 156 Mo. App. 18; Corough v. Hamill, 110 Mo. App. 53. (3) In the absence of a timely and proper notice to defendant, plaintiff cannot recover in this action the costs of litigation or attorneys' fees expended in the former suit. Quick v. Walker, 125 Mo. App. 257; Hazlett v. Woodruff, 150 Mo. 534; Matheny v. Steward, 108 Mo. 73. (4) This proceeding not being based upon, nor growing out of, nor connected with any business or transaction had with the husband of plaintiff, he was not a competent witness to testify in behalf of the plaintiff, his wife, and defendant's objection should have been sustained. R. S. 1909, sec. 6359; Joplin ex rel. v. Freeman, 125 Mo. App. 717; Gardener v. Railroad, 124 Mo. App. 461; Orchard v. Collier, 171 Mo. 390.

J. H. and *W. E. Bailey* for respondent.

(1) It is uniformly held that where a deed described lots by numbers in an addition the recorded plat and field notes may be construed with the deed to show the dimensions of lots conveyed. 13 Cyc. 628. (2) Where no other description is given than by lot numbers in the survey of an addition to a town the authentic map of such survey is as much a part of the deed as though set out in it. Dolde v. Bodicka, 49 Mo. 98; McKinney v. Doane, 155 Mo. 297. (3) The evidence shows that plaintiff gave defendant notice that she expected him to place her in possession of the strip of ground in question and make good his warranty long before any suit was instituted by her. No particular form of notice is required and it need not be in writing. Chamberlain v. Preble, 11 Allen

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(Mass.), 374; Miner v. Clark, 15 Wend. (N. Y.) 426; Somers v. Schmidt, 24 Wis. 417. (4) The defendant had proper and timely notice and is therefore liable for costs, attorneys' fees and the value of the strip of ground. Long v. Wheeler, 84 Mo. App. 106. (5) Where the possession of a portion of the land conveyed by warranty deed cannot be given by the grantor the covenant of seizin is broken at the deliery of the deed and the cause of action accrues. Foster v. Byrd, 119 Mo. App. 168; Pence v. Gabbert, 63 Mo. App. 307. (6) Nothing is better settled in this State than the proposition that the husband can prove his agency by his own testimony. Leete v. Bank, 115 Mo. 204; Smith v. Wilson, 160 Mo. 667; Orchard v. Collier, 171 Mo. 390; Reed v. Peek, 163 Mo. 333. (7) The finding of the court, the jury being waived, will not be interfered with unless there is an absence of substantial evidence to sustain such finding. Vincent v. Means, 207 Mo. 713; Irwin v. Woodmansee, 104 Mo. 407; Handlan v. McManus, 100 Mo. 124.

STATEMENT.—This was an action for damages for an alleged breach of the covenants of warranty contained in a certain general warranty deed whereby appellant conveyed to respondent, a married woman, lots 24, 25 and 26 in Chase & Slawson's addition to the city of Carthage, in Jasper county, Missouri, for a consideration of $3000.

It is admitted that the plat book shows the lots in question to be fifty feet wide, east and west, and one hundred and seventy-eight feet long, north and south. The deed made no reference to the plat or map, designated no quantity of land contained in the lots, and made no mention of the width or depth of said lots, other than the description in the deed which was as follows: ". . . the following described lots, tracts or parcels of land, lying, being and situate in the county of Jasper and State of Missouri, to-wit: Lots

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24, 25 and 26 in Chase & Slawson's addition to Carthage."

There were no boundaries or monuments visible and none were ever pointed out to the respondent before the deed passed: After she had purchased the lots, she found on a survey that a small strip on the west side of lot 24 was in the possession of one Willis Wallingford, the adjoining owner, which fact was unknown to her before she bought the lots. Litigation as instituted and prosecuted by her against Wallingford, which after three trials resulted in a judgment for Wallingford, adjudging the title in him of this small strip in question, which judgment was introduced in evidence in this case. From his own testimony in this case it appears that defendant herein was a witness in the three trials between plaintiffs and Wallingford. Defendant's deed to plaintiff followed the same form as that whereby defendant acquired title to the lots, and there is no evidence of any fraud or misrepresentation made by the defendant to the plaintiff.

The plaintiff seeks to recover from the defendant the value of the strip of land on the covenant of warranty contained in her deed, and for the costs, expenses and attorneys' fees paid out by her in the Wallingford suit.

The answer of the defendant was a general denial.

A jury being waived, the case was submitted to the court for trial, and judgment was rendered for plaintiff in the sum of $196.50. At the close of the plaintiff's case defendant tendered a demurrer to the evidence which was overruled. No declarations of law were asked or given by the court.

OPINION.

FARRINGTON, J. (after stating the facts).—Error is assigned in the refusal of the trial court to

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sustain defendant's demurrer to the evidence. A sufficient answer is that defendant waived his demurrer by introducing his evidence instead of standing on the demurrer or again presenting it at the close of all the evidence. [Lohnes v. Baker, 156 Mo. App. 397, 137 S. W. 282; Tremain v. Dyott, 161 Mo. App. 217, 142 S. W. 760.]

The important contentions made by appellant are: (1) That under the facts the plaintiff is not entitled to the finding of the court and the judgment rendered, for the reason there was no breach of the covenant of warranty. (2) That as to the attorneys' fees and costs of the litigation growing out of the Wallingford case this defendant could not be held because of the failure of the plaintiff to give notice. And in this connection it is urged that the trial court committed error in allowing the plaintiff's husband to testify concerning a conversation he had with the defendant after plaintiff found that Wallingford was in possession of the strip off of lot 24.

The real contention to be decided is whether—in the absence of anything in the deed as to the quantity of land conveyed, and with no mention of any monuments, and there being no evidence offered at the trial of any monuments having been shown to plaintiff—she can recover on the covenants of warranty for the strip Wallingford obtained (which, in fact, is a part of lot 24, as platted), where the deed conveyed by lot number only, and where there is no question about the title and possession of the balance of the lot which she received by the deed and of which she is now, in unquestioned possession under said conveyance.

Under our view of the law, such an action will lie.

In the case of Adkins v. Tomlinson, 121 Mo. 487, 26 S. W. 573, the title to a small strip of a certain lot described in a warranty deed had failed

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and the Supreme Court held that when the grantor is not, at the time of making his deed, in possession of part of the property described therein, and has no title thereto, his covenant of indefeasible seisin is broken as soon as made and the measure of damages for the breach of such covenant is the purchase price of said part, with interest from the date of the deed. [See, also, Murphy v. Price, 48 Mo. 247; Falk v. Organ, 160 Mo. App. 218, 141 S. W. 1; Frank v. Organ, 167 Mo. App. 493, 151 S. W. 504.]

There is a breach of the warranty of seisin when the deed is made; hence the measure of damages is the purchase price.

Another controlling principle in this case is that in the absence of monuments, where a lot is deeded by a certain number, which number is one of a legally platted addition to a city, the grantee has a right to rely on getting the full amount of land called for in the recorded plat or map. [Rutherford v. Tracy, 48 Mo. 325; Dolde v. Vodicka, 49 Mo. 98; McKinney v. Doane, 155 Mo. 287, 297, 56 S. W. 304; Whitehead v. Atchison, 136 Mo. 485, 497, 37 S. W. 928.

The deed to the plaintiff in this case conveyed by lot number only. There were no monuments pointed out to her. The plat of the addition shows that lot 24 is fifty feet in width and one hundred and seventy-eight feet in length. She in fact obtained title and possession to all of lot 24 except a strip on the west side, six inches wide at one end and eighteen inches wide at the other. She brought suit against Wallingford to recover this strip which was in fact a part of lot 24. The court in that case, having jurisdiction of the parties and the subject-matter of the action, found that plaintiff by virtue of her deed had no title or right of possession to the strip, and adjudged the title thereto to be in Wallingford.

There can be no question about plaintiff's right to recover from her covenant or the value of that part of

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the lot, her recovery to be based on the price she paid for the entire lot. There being no mention as to quantity in the deed—as was said in Wood v. Murphy, 47 Mo. App. 539—plaintiff must take the risk of getting only what lot 24 contained, and that, according to the plat, was fifty feet. The case of Adkins v. Quest, 79 Mo. App. 36, and other cases cited by appellant do not control here for the reason that they dealt with questions where quantity is held merely descriptive, and they hold that in the absence of fraud, had the deed in this case conveyed "Lot 24 in Chase & Slawson's addition to Carthage," followed by "the same being sixty feet, east and west, by one hundred and seventy-eight feet, north and south," the covenant would cover only what lot 24 actually contained, and the quantity mentioned would be held to have been merely descriptive. This rule, to be just, must work both ways; so that the grantee has a cause of action to recover damages for all that part of lot 24 which she did not acquire by the deed, and there being no declarations of law asked or given, this court has no doubt that the learned trial judge correctly arrived at the value of the strip of ground at the time when the deed was made, and allowed six per cent interest on that sum—which is the measure of damages where there is a breach of the covenant of seisin.

We now confront the question as to the sufficiency of the notice given the defendant.

Our view of the law is that in order to hold the covenantor on his warranty to defend, the covenantee must not only give him plain and explicit notice of the alleged default in the title that his deed purported to convey, but that said notice must amount practically to an invitation or demand to come forward and assume control of the litigation which is to be begun either by the covenantee to defend or by the covenantee to prosecute in order to obtain ownership and possession of what the deed calls for. This rule prob-

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ably goes farther than that stated in the cases cited in appellant's brief, which renders a discussion of them unnecessary. In applying the rule to the case in hand, there being no written notice given, we have only to examine the testimony of the parties to the action, the plaintiff's husband, and the plaintiff's attorney. We find nothing in the testimony of plaintiff's attorney—who first called on defendant— from which defendant could be held, as the attorney says the purpose of that visit was to get information about the lines. His testimony does show, however, that from that time on defendant did know there was some trouble between plaintiff and Wallingford, and that plaintiff's claim was based on this warranty deed, and that defendant was told if Wallingford did have title he (the defendant) would be expected to make good his warranty; and this was known to him a month before any suit was brought. Possibly this, standing alone, would not be sufficient. The plaintiff says that before instituting suit against Wallingford she went to the defendant herein and told him of the shortage of the strip in lot 24 and "asked him if he would defend the title to that, and asked him what he would do about it and that it wasn't as he said it was;" that on asking defendant whether he would defend the title, he refused to say whether he would or not. On the cross-examination of defendant, the following question was asked concerning a conversation defendant had with Mr. Bailey, an attorney, before the last suit against Wallingford was brought: "Didn't I tell you they would expect you to respond to them in damages for any amount they might sustain?" His answer was, "I thought you were joking." The record further shows that before the Wallingford litigation was instituted, the plaintiff, who was ill at the time, requested her husband to interview the defendant herein relative to the strip of ground; that this was the only time he had ever acted for his wife in this connection;

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that he saw the defendant and notified him of the trouble concerning lot 24. The husband testified at the trial that defendant when asked what he would do about it gave an unsatisfactory answer and treated it as a joke, and that he (the witness) then said: "Mr. Dreisbach, my wife bought this property from you and she expects you to defend the title. If you don't do it, we will have to bring suit against Mr. Wallingford." And the husband testified that defendant's reply to this was, "Well, go ahead and bring suit." We think this shows sufficient notice to the defendant of the claim of Wallingford, which claim afterward ripened into a judgment in his favor, as well as throwing open to him the privilege of getting the matter straightened out for himself. Defendant had sufficient notice to move a reasonably prudent man to take some action if he cared to, and as he did not do so, he cannot now be heard to complain.

The appellant assigns as error the action of the trial court in permitting the husband of plaintiff to testify. As we have quoted in the opinion some of the conversation of the husband with the defendant it will be necessary to consider this point.

The testimony of the husband was material only as to the character of notice given the defendant on which was undoubtedly based plaintiff's right to recover costs and attorneys' fees in the Wallingford litigation. The plaintiff, in order to recover such items, must either have given such notice herself, or have had someone act for her, and it must have been done before the suit was instituted, or at least in time to have given the defendant herein a chance to protect himself if he so desired.

That a husband may establish his own agency when acting for his wife in a given matter is unquestioned in this State since the holding to that effect in Leete v. State Bank of St. Louis, 115 Mo. 184,

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204, 21 S. W. 788; Close v. Hurst, 151 Mo. App. 75, 131 S. W. 751.

The very foundation of plaintiff's cause of action, so far as costs and attorneys' fees are concerned was the giving of sufficient notice to the defendant, as was held in the case of Gardner v. Railroad, 124 Mo. App. 461, 464, 101 S. W. 684. "If the cause of action," said the court in that case, "had arisen from some business affair between him and the defendant in which he represented his wife, he would have been competent to testify regarding the affair."

The testimony of the husband here is that before the suit was brought against Wallingford, he at the request of his wife, who at the time was ill, went out and had an interview with defendant concerning the trouble over this strip of ground; that in such interview, he was there representing his wife.

As the very basis of a part of the measure of plaintiff's damages was whether she gave certain notice, where the husband, being sent to represent the wife, gave the notice, he certainly should be permitted to testify concerning his acts with reference to what he did in the representative capacity.

All the objections to the judgment and trial which were raised by the appellant having been considered and deemed by the court of insufficient weight to require interference with the action of the trial court, the judgment is affirmed. All concur.

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ELMER MURPHY, Respondent, v. SOUTHWEST MISSOURI RAILROAD COMPANY, Appellant.

Springfield Court of Appeals, February 3, 1913.

1. **ASSAULT AND BATTERY: Damages for: Scope of Employment.** When an assault occurs, if the person who commits the assault (when an employee as well as an officer of the law) acts within the scope of his employment and under instructions of his employer, any wrongful act in his conduct is chargeable to the employer.

2. **———: ———: Respondeat Superior.** If the act done was within the scope of the duty imposed upon the employee by the employer by his contract of service, the principle, "*respondeat superior*," applies.

3. **INSTRUCTIONS: Harmless Error.** An instruction which is predicated on the facts with a direction to find for or against a party must recite all the controverted or disputed facts essential to a recovery. But where there is no dispute about the facts on a necessary issue or where one of the necessary issues is admitted by the adversary, it is not reversable error for the court to assume such fact.

4. **———: Assuming Facts in Instructions.** The capacity in which Coates was acting at the time of the assault being put in issue by the evidence, the trial court properly refused an instruction requested by the appellant which assumed that Coates was acting merely as a deputy sheriff and not within the scope of his authority as an employee of the appellant.

Appeal from Jasper Circuit Court, Division Number One.—*Hon. Joseph D. Perkins*, Judge.

AFFIRMED.

McReynolds and *Halliburton* for appellant.

1. When a police officer is assigned to special duty in connection with the operation of street cars or pleasure resorts, although he is appointed and assigned at the request of the company, and is paid by the company, where he acts solely in his capacity as a police officer and not under the direction of the com-

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pany, the company is not responsible for wrongs committed by him. He is presumed to act in his official capacity and before the company can be held liable for his acts in arresting a party and for assault and battery in making such arrest, it must be shown that the arrest and assault were at the instigation or direction of the company. Brill v. Eddy, 115 Mo. 604; 2 Woods' Railway Law, 1212; Improvement Co. v. Steinmeier, 20 Atl. 188; Jardine v. Cornell, 14 Atl. 590; Foster v. Railroad, 140 Mich. 689, 104 N. W. 200. 2. When a disorderly person is arrested by a police officer, the presumption is that the officer is acting in an official capacity, and not as agent for the party who by law is required to pay him. Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590.

Clay and *Davis* for respondent.

1. It was a question of fact for the jury, and not a question of law for the court, to determine whether Coates at the time he took charge of and assaulted plaintiff, was acting as the servant of defendant, under express or implied authority, or whether he was acting in his official capacity of deputy sheriff. Sharp v. Railroad, 76 N. E. 923; Brill v. Eddy, 115 Mo. 596; Deck v. Railroad, 59 Atl. 650; 108 Am. St. Rep. 399; Improvement Co. v. Steinmeier, 20 Atl. 313, 8 L. R. A. 846. 2. It suffices that the officer in the employment of a private person or corporation had implied authority or direction from the employer to do the act. In other words, if the act done was within the scope of the duty imposed upon him in favor of the employer by his contract of service, the principle of *respondeat superior* applies. McLain v. Railroad, 65 W. Va. 233, 64 S. E. 18.

STATEMENT.—This action was brought by Elmer Murphy against the appellant in the circuit court of

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Jasper county, the petition alleging that the defendant by its employee, W. L. Coates, assaulted the respondent at Lakeside Park, a pleasure resort in Jasper county owned and controlled by the appellant. Respondent prayed for actual damages in the sum of two thousand dollars and punitive damages in the sum of five thousand dollars. The case was tried by a jury and resulted in a verdict and judgment in favor of the respondent in the sum of one hundred dollars, from which the defendant appealed to this court alleging error in the action of the trial court in the giving and refusal of instructions.

It is intimated in the brief of appellant and was admitted in open court here during the course of the argument that the jury was justified in finding there was excessive force used by W. L. Coates in ejecting respondent from the park.

The facts are substantially as follows:

Appellant railway company operates this pleasure resort where there is a body of water, boats, baseball grounds, and other concessions usually found in such a place. For the purpose of maintaining peace and order within the park and for the purpose of ejecting intoxicated persons and objectionable characters from said grounds, the railway company employed one W. L. Coates, who was instructed by the superintendent of the railway company, according to that official's testimony, "not to allow any drinking publicly on the grounds and to eject all drunk and objectionable characters." According to W. L. Coates' testimony his instructions from his employer were as shown by the following questions and answers appearing in the record: "Q. You did have general orders to arrest drunk people? A. I had orders to get them off the park. Q. And to arrest people guilty of disturbing the peace? A. Not to arrest them but to keep them off the park. If I can't talk them off or persuade them off, I put them off. That was my

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duty to put them off is necessary. That was what I was employed by the street car company to do."

The evidence shows that W. L. Coates on his own initiative and on the solicitation of the railway company's officials secured from the sheriff of Jasper county a commission as deputy sheriff, and that the only compensation he received was paid him by the railway company; that he made no reports to the sheriff, was never given any writs to serve, nor assigned any of the duties that are ordinarily performed by a deputy sheriff.

The assault occurred on Sunday, July 16, 1911. The evidence shows that respondent worked until noon that day at a mine, and that he went home, changed his clothes, took two or three drinks of whiskey, and went to the park between one and two o'clock in the afternoon in company with friends who were witnesses in this case, taking with him a pint of whiskey. This was consumed by respondent and his friends in a cornfield near the park soon after their arrival at the park. There can be no doubt from the evidence that respondent was more or less intoxicated.

It appears that while a baseball game was in progress respondent was seated in the grandstand and that in moving them one of his feet struck a spectator sitting in front of him and that several words passed between them, but on the suggestion of deputy sheriff Lamb who was nearby this altercation ceased and respondent soon afterward left the grandstand. W. L. Coates was not present and did not see this trouble. There is some evidence in the record—which is denied by respondent—to the effect that Coates did see respondent after he left the grandstand and told him that he was drunk and that he had better leave the grounds. However, there was no altercation or disturbance, and Coates went on about other business and did not at that time interfere with respondent.

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After the baseball game when the crowd was coming from the ball grounds to the main part of the park and crossing a footbridge, Coates took his stand at the south end of this bridge for the purpose of preventing persons in the main part of the park from attempting to cross the bridge toward the ball grounds. While he was standing at this place some one told him there was a drunk on the bridge causing some trouble, and very soon the respondent came along. Coates testified that he then said to respondent: "Say, Buddy, I told you a while ago you better get away from the grounds. You are full. . . . I am going off the park; come and go with me and and we will get off the park without any trouble. I am getting off the park. Come on, and we will get right off together. . . . I am going; come on and we will go together. I will see that you get away without any trouble, help you away; I am going over." They walked but a short distance when trouble started, it appearing from the testimony of several witnesses who testified for the respondent that Coates knocked respondent down and beat him over the head with a leather-covered billy such as is ordinarily carried by police officers. Respondent finally was gotten on his feet, and somewhere between the place where this trouble occurred and the park gate respondent was knocked down again and beaten by Coates with the same weapon, and there is evidence that Coates kicked him while down. After reaching the gate, further trouble started, and there is testimony that Coates knocked respondent down several times and beat him over the head and in the face. At this juncture one of defendant's employees came to Coates' aid and they together by pushing and pulling managed to get respondent down to a little holdover which is maintained there by the company for the temporary retention of objectionable characters. On the way from the gate to the holdover it appears that respondent was

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swearing and resisting, and that he either fell in or was pushed in a mudhole. Respondent was soon after taken to Webb City by the constable of Mineral township in which Lakeside Park is located, and incarcerated, and the next morning pleaded guilty before a justice of the peace to a charge of disturbing the peace of the neighborhood of the vicinity of Lakeside Park by making loud and unusual noise, by quarreling, threatening, challenging and offering to fight and by fighting.

There is no question but that respondent was severely treated and that excessive force was used in taking him from the park and putting him in the holdover; but, as stated, this is practically conceded by the appellant.

The appellant contends in this court that the acts of Coates were those of an officer of the law, and not acts for which appellant can be held liable as his employer.

OPINION.

FARRINGTON, J. (after stating the facts).—The authorities cited by both appellant and respondent agree in holding that an amusement company, railway company, or any person or persons engaged in handling the public at their places of business have a right to employ servants to maintain order and protect their property and eject objectionable characters; this person so employed may or may not be a regularly commissioned officer of the law; and the mere fact that such person is paid by the defendant would not, standing alone, make the defendant responsible. [Brill v. Eddy, 115 Mo. 596, 605, 22 S. W. 488; Sharp v. Erie R. Co., 76 N. E. (N. Y.) 923; Deck v. Baltimore & O. R. Co., 59 Atl. (Md.) 650; Tolchester Beach Improvement Co. v. Steinmeier, 8 L. R. A. (Md.) 846;

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Foster v. Grand Rapids Ry. Co., 104 N. W. (Mich.) 380; McKain v. Baltimore & O. R. Co., 64 S. E. (W. Va.) 18, 23 L. R. A. (N. S.) 289; Healey v. Lathrop, 50 N. E. (Mass.) 540; Cordner v. Boston & M. R. Co., 57 Atl. (N. H.) 234; Tucker v. Erie Ry. Co., 54 Atl. (N. J.) 557; Pennsylvania R. Co. v. Kelly, 177 Fed. 189.] The authorities further agree that when an assault occurs, if the person (when an employee as well as an officer) acts within the scope of his employment and under instructions either express or implied, general or special, of his employer, then any wrongful act in his conduct is chargeable to the employer. If his act, on the other hand, does not fall within the scope of his employment and is without direction of his employer, then of course his conduct is not chargeable to his employer. In this case, the plaintiff by his instructions assumes that the evidence shows that Coates was acting under the direction of the railway company and that what he did was within the line of his duty as such employee. The defendant by its instructions assumed the very opposite, namely, that under the state of facts presented Coates was acting without the scope of his authority and as a deputy sheriff, for which the company would not be responsible.

The instructions which were requested by the defendant and refused by the court we think were properly refused because of the failure of the defendant to predicate them on the facts and the law as above indicated. The giving of any one of the instructions requested by the defendant would practically have amounted to a directed verdict as they ignore entirely the material question in the case—whether the act was done by Coates while acting within the scope of his authority and under the direction of the defendant. Exactly the same omission was made by the respondent in drawing his instructions as he entirely ignores the fact that Coates might have been acting

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as a deputy sheriff, and assumes in his instructions that Coates was acting as defendant's servant; and there is no doubt that the instructions of the respondent would be erroneous for a failure to permit the jury to pass on the question as to whether the act was done within the scope of his employment and under the direction of the company but for another consideration. There is no question but that in an instruction which is predicated on the facts with a direction to find for or against a party, all the disputed or controverted issues necessary to a recovery must be recited in the instruction. However, where one of the necessary issues is admitted by the adversary, or where there is no dispute about the facts on a necessary issue, then, while it is better that the finding be put in the instruction, yet the court may assume such fact without committing reversible error. In other words, it would have been better to have instructed the jury that if they found that Coates was an employee of the defendant company, and if they found that what he did came within the scope of his authority and under the direction of the defendant, and that Coates, acting as such employee, attempted to eject plaintiff from said park—etc. However, as all the evidence shows without any contradiction that Coates was an employee of the defendant company, that he had general instructions to eject objectionable characters and intoxicated persons from the park, and that what he did was within the scope of his authority, the trial court could assume in the instruction such a state of facts without requiring the jury to so find.

From the very language which was used by Coates at the time he took charge of respondent at the bridge it will be clearly seen that he did not then intend to arrest the respondent but merely to escort him off the grounds; besides, there is no evidence in the record of any offense committed by respondent up to that

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time which would have justified Coates in placing him under arrest; at least none had been committed in the presence of Coates. It is therefore apparent that Coates started off with the respondent, not having arrested him, not for the purpose of taking him to jail—which was all he could have done as a deputy sheriff—but for the purpose of getting him off the grounds which was within the scope of his authority as defendant's employee and which was in the line of his duty under his instructions from the railway company.

After a careful examination of this record we are convinced that the verdict and judgment were for the right party; that the jury rendered their verdict in the exercise of a sound discretion, realizing, perhaps, that respondent by going to a public park where there were women and children and becoming intoxicated and obnoxious to all about him brought down the trouble upon his own head, and gave him small compensation, yet made the verdict for a sufficient amount that persons employing special officers would understand that they are required to select men who will not become oppressive and abuse their authority. Finding no reversible error with reference to the instructions given or refused, and believing that the judgment was for the right party, it is accordingly affirmed. All concur.

W. B. WINDLE et al., Respondents, v. SOUTHWEST MISSOURI RAILROAD COMPANY, Appellant.

Springfield Court of Appeals, February 3, 1913.

1. **STREET RAILROADS: Care Required of Persons Operating.** Persons in charge of railroad cars of all kinds must keep a constant and vigilant lookout along the track to prevent injury to persons and property likely to be thereon. This obligation is

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especially binding when the car's course is over a much traveled street in a city.

2. ———: **Duty Extends to Discovering Danger.** This duty is not fulfilled by an endeavor to prevent injury after the danger is actually seen; but it is just as incumbent to use such care and diligence in watching for and discovering any probable danger.

3. **HUMANITARIAN DOCTRINE: Applicability of.** The humanitarian doctrine assumes that the object in danger of being injured is capable of comprehending the danger and of intelligent action, hence of contributory negligence. The doctrine is not applicable to young children, persons *non compos mentis* or animals.

4. **CITY ORDINANCE: Exclusion from Evidence: Proximate Cause.** An ordinance of the city prohibiting horses from running at large is not available as a defense in the case stated. Such ordinances are not enacted for the benefit of railroads, and their violations are not the proximate cause of the injury. And the exclusion of such an ordinance was not error, since there was a duty incumbent on those operating the car, regardless of any ordinance.

5. **DEFENSE: Contributory Negligence.** The plaintiffs were not guilty of contributory negligence as a matter of law in permitting the horse to break loose in the manner shown in the evidence and to continue on down the street loose, but closely watched by the plaintiff and his employees.

6. **PLEADING: In Justice Court.** Pleading in justice court is not scrutinized by as strict rules as in a circuit court.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. David E. Blair,* Judge.

AFFIRMED.

McReynolds and *Halliburton* for appellant.

1. The humanitarian doctrine presupposes negligence or contributory negligence on the part of the party invoking the rule and in its essence is that, conceding that plaintiff was guilty of negligence, yet if defendant knew of his peril in time to save his life and limb by ordinary care then it was his duty to exercise such care, and failure to do so rendered him liable. Hall v. Railway Co., 219 Mo. 553; Potter v.

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Railway Co., 136 Mo. App. 125; Dey v. Railway, 140 Mo. App. 461; Nipper v. Street Railway, 145 Mo. App. 224; Nivert v. Railway, 232 Mo. 626; Smith v. Heibel, 157 Mo. 177; Maty v. Railway, 217 Mo. 275; McGee v. Wabash, 214 Mo. 530. 2. The motorman had a right to presume that the horse would leave the track. Bennett v. Metropolitan, 121 Mo. App. 605; Bunyan v. Railway, 127 Mo. 17; Boyd v. Wabash, 105 Mo. 371; Maxley v. Railroad, 123 Mo. App. 84; Aldrich v. Transit Co., 101 Mo. App. 77; Petty v. Railroad, 179 Mo. 666; Reno v. Railroad, 190 Mo. 469; Cole v. Metropolitan, 122 Mo. App. 703. 3. And no duty rested upon him until such time as it became evident that the horse would not leave the track. Then it becomes his duty to use appliances at hand to stop his car before he struck the horse if he could do so with safety to his car and passengers. Molyneux v. Railroad, 81 Mo. App. 25; Holden v. Railroad, 177 Mo. 456; Aldrich v. Transit Co., 101 Mo. App. 77; Cole v. Metropolitan, 122 Mo. App. 703; Gessuer v. Metropolitan, 137 Mo. App. 47; Haffey v. Metropolitan, 154 Mo. App. 493; Sites v. Knott, 197 Mo. 712. 4. Unless we are to say that the measure of duty owed a mere dumb brute is higher than that which our courts accord a human being then the court should have sustained a demurrer to the evidence. No court would permit a man to walk or run open eyed and free limbed into a car or a train and allow recovery for his death. Case after case of this character has been decided by our appellate courts who have declared that a man has no right to take his life in his hands in such a manner and that no recovery can be had in such a case. Sissel v. Railroad, 214 Mo. 515; McGrath v. Railroad, 197 Mo. Brockschueidt v. Railroad, 205 Mo. 435; Degonia v. Railroad, 224 Mo. 564; Reno v. Railroad, 180 Mo. 469. 5. The plaintiffs were guilty of contributory negligence such as to preclude recovery when they permitted this mare to drift south for ten blocks along a

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double track of the street railway, making no effort to control her and knowing that the cars passed along them every few minutes. Mulburn v. Railroad, 86 Mo. 104; Prather v. Railroad, 84 Mo. App. 88; Gee v. Railroad, 122 Mo. App. 358. 6. The court erred in refusing to admit Section 1 of Ordinance 1999 of the Joplin city ordinances in evidence. The violation of this ordinance was a proper question of fact to submit to the jury and the ordinance should have been admitted. Patton v. Railroad, 14 Mo. App. 589; Gilmore v. Railroad, 34 Am. Rep. 682.

W. J. Owen for respondent.

1. On appeal, the party in whose favor a verdict has been rendered is entitled to the benefit of every reasonable inference of fact which the evidence warrants to support the verdict; and, where the verdict is for the plaintiff, the evidence should be viewed by the appellate court, in its most favorable aspect, in support of the verdict. Arnold v. Carson, 95 Mo. App. 426; Cunliff v. Hansman, 97 Mo. App. 467; Holloway v. Kansas City, 184 Mo. 19. 2. This suit was instituted in the justice court, and only general allegations of neglect alleged; and that is all that is necessary in this class of cases. Schneider v. Railroad, 75 Mo. 295; Boone v. Railroad, 20 Mo. App. 232; Hill v. Railroad, 49 Mo. App. 520. 3. In running through towns and cities, motormen in charge of cars are expected to be more careful than at other places where not so likely to injure persons or property, and especially when running longitudinally in a much-traveled street, and must keep a constant and vigilant lookout, even in the absence of an ordinance; and failure to do so is a failure to exercise ordinary care, and, therefore, negligence. Frick v. Railroad, 75 Mo. 609; Holden v. Railroad, 177 Mo. 456; Lamb v. Railroad, 147 Mo. 204; Sluder v. Transit Co., 189 Mo. 107. 4. The

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failure of the motorman to discover the horse on the track was the result of the omission of that measure of duty which the law requires, in view of the locality, circumstances and dangers to be anticipated; and the due observance thereof would have enabled the motorman to have avoided the injury by the use of reasonable care. Hilz v. Railroad, 101 Mo. 36; Klockenbrink v. Railroad, 172 Mo. 678. 5. The statutory presumption of negligence arising from proof of the killing of live stock by the defendant's train, being a rule of evidence, is not modified by the stock law to restrain animals from being at large; and it is only a circumstance to be considered by the jury on question of negligence. Davis v. Railroad, 25 S. E. 224; Horn v. Railroad, 12 N. W. 752; Orcutt v. Railroad, 24 Pac. 661. 6. The motorman did not ring a bell or sound an alarm to frighten the horse, although it could be seen on the track for more than a block. Kendrick v. Railroad, 81 Mo. 521. 7. Proof of failure of a railroad to ring a bell, or sound a whistle, and the killing of stock, which was unfettered and in a situation to escape, if the signal had been given, makes a prima facie case against defendant. Persinger v. Railroad, 82 Mo. 196; Midgett v. Railroad, 124 Mo. App. 544; Rinehart v. Railroad, 129 Mo. App. 173. 8. A motorman has no right to reason that a horse or a child too young to be responsible in law for its conduct, when approaching the tracks of a street car, although looking at the car, will stop before it reaches a place of danger. A horse to whom negligence cannot be imputed could not be expected to reason with the danger of an approaching car, and get off the track, in order to avoid injury. Livingston v. Railroad, 170 Mo. 452.

STURGIS, J.—The plaintiffs sued in a justice court and obtained judgment against the defendant street car company for killing their horse on Main

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street in the city of Joplin. On appeal and trial anew in the circuit court plaintiffs again prevailed and the case is here on appeal. The way in which the horse happened to be on Main street of Joplin and collided with defendant's street car is that it was being taken by the owner, along with some twenty other horses, from the railroad stock yards in the north part of town to the plaintiffs' horse barn in the south part of town. They were tied with halters in bunches of three to five, each bunch in charge of a man or boy on horseback, and led along Main street going south. This is the principal thoroughfare of Joplin and defendant has double car tracks thereon and cars are passing each way every few minutes.

Along about Tenth street, the numbers growing larger as you go south, one bunch of horses got tangled up by one or more horses trying to go around the others, causing the horse in question to break loose from the bunch, whence it proceeded on south as a sort of free lance, but following the other horses and to some extent watched and guided by the men in charge. At about Eighteenth street this loose horse forged ahead, got on the defendant's east track and proceeded in a sharp trot down the track till it was struck by a northbound car about midway between Nineteenth and Twentieth streets.

The plaintiffs' petition alleges "that defendant through its agents and employees in charge of its car No. 29, and by reason of the negligence of said agents and employees in charge of said car, ran said car to and against said horse, etc." The court, by an instruction given at plaintiffs' instance, submitted the case to the jury only on one ground of negligence, "that the motorman in charge of defendant's car which struck plaintiffs' horse saw plaintiffs' horse in a position of imminent peril, or by the exercise of ordinary care could have seen plaintiffs' horse on said track and in such position of imminent peril,

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in time to have controlled the speed of said car and avoided the collision by exercise of ordinary care with the means and appliances at hand without injury to the passengers on said car, and that said motorman nevertheless negligently permitted said car to run into and against plaintiffs' horse and injure same."

Something is said as to the petition not being sufficient to warrant a submission of the case on this theory of negligence. Certainly in a justice court, where it takes a very skillful lawyer to draw a bad pleading, this general allegation of negligence, taken with the facts stated as to the horse getting loose and being on the defendant's track, is sufficient to warrant a submission of this case on this ground of negligence. [Hill v. Railroad, 49 Mo. App. 520, 121 Mo. 477, 26 S. W. 576; Mack v. Railroad, 77 Mo. 232; Boone v. Railroad, 20 Mo. App. 232; Schneider v. Railroad, 75 Mo. 295.]

The defendant contends that the instruction above mentioned submits the case on what is termed the "humanitarian doctrine" and insists that the legal principles applicable to cases of that character be applied to this case; and hence that the defendant's motorman in charge of the car had a right to assume that the horse would leave the track and owed the horse no duty until it became evident that the horse was oblivious to danger, etc. As a corollary to this it is insisted that the defendant owes no higher duty to a horse on the track than it does to a human being. [Citing Bennett v. Railroad, 122 Mo. App. 703, 99 S. W. 480; Sissel v. Railroad, 214 Mo. 515, 113 S. W. 1104, and like cases.] This reasoning is wrong in that it assumes that the degree of care imposed in such cases is based on the value of the object in danger of being injured, which, though a fact to be considered in proper cases, is not a fundamental distinction. The humanitarian doctrine assumes that the object in danger of being injured is capable of comprehending

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the danger and of intelligent action, and hence of contributory negligence. The doctrine has no application to young children or to persons *non compos mentis* and should not be applied to horses. "Horse sense" does not go that far. [Livingston v. Railroad, 170 Mo. 452, 471, 71 S. W. 136; Boland v. Railroad, 36 Mo. 487; 7 Am. & Eng. Ency. Law (2 Ed.) 405; 29 Cyc. 533 and 537.]

It is well settled, we think, that the persons in charge of railroad cars of all kinds must keep a constant and vigilant outlook along the track to prevent injury to persons and property wherever there is reason to believe such persons or property are likely to be found on such tracks; and this applies especially to cars passing rapidly along the much traveled streets of a populous city. [Sluder v. Transit Company, 189 Mo. 107, 136, 88 S. W. 648, and cases cited.]

This duty is not merely to use ordinary care to avoid injury after the danger is actually seen by the motorman but to use such care and diligence in watching for and discovering the danger. [Atterberry v. Railroad, 110 Mo. App. 608, 614, 85 S. W. 114; Beall v. Railroad, 97 Mo. App. 111, 71 S. W. 101; Spencer v. Railroad, 90 Mo. App. 91, 94; Hill v. Railroad, 49 Mo. App. 520, 534, 121 Mo. 477, 26 S. W. 576; Wasson v. McCook, 80 Mo. App. l. c. 489.]

On this branch of the case the court at defendant's request charged the jury that the mere fact of the horse being on the track traveling toward the car did not require the motorman to check or stop the car or sound the whistle, but that the motorman might assume that the horse would leave the track, and before the plaintiffs could recover the jury must find that there was something in the action or conduct of the horse to notify the motorman that the horse was unaware of the danger of the coming car. This instruction is certainly as favorable to defendant as it is

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entitled to, and perhaps more so, under the authorities above cited.

This instruction would have been more appropriate in a case where the horse was not actually on the track but so near to it as to raise a question of the motorman's duty in avoiding a collision in case the horse should move onto the track from fright or other cause. [Moxley v. Railway Co., 123 Mo. App. 84, 99 S. W. 763.]

It will readily be seen that this case is far different in its facts from Hebeler v. Met. Ry. Co., 132 Mo. App. 553 (112 S. W. 34), where the horse was being driven by and was under the direct control of the plaintiff. In that case it was the driver and not the horse on whose intelligent action in moving away from danger the motorman had a right to rely.

It could hardly be contended that the facts proven are insufficient to warrant the court in submitting to the jury the question of whether or not the motorman did see, or by the exercise of ordinary care might have seen, the horse on the track and it and the car moving toward each other in sufficient time to have avoided the collision by checking or stopping the car. The accident occurred after dark but the street was so well lighted that several bystanders saw the details of the accident and the car was equipped with a head light and running on a straight track. The evidence was that the horse could be readily seen as it and the car approached each other, each coming straight down the track, for at least a block. The car was equipped with air brakes and did stop within ten feet when it struck the horse. While there was no expert evidence to show the exact space within which a street car so equipped could be stopped, yet, to hold that such a car so equipped and usually stopping at every street crossing could not have been controlled or stopped by an active and alert motorman

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within the space of a half block or more is to go against common knowledge.

The court refused to admit in evidence a section of an ordinance of the city of Joplin prohibiting horses and other animals from running at large and this is assigned as error. There are two answers to this contention. One is that the court admitted another ordinance of said city having practically the same provisions. Another answer is that such an ordinance only bears on the question as to whether the persons in charge of the moving car are required to anticipate such stock being on the track and must therefore keep a vigilant watch to see that the track is clear. [Averill v. Santa Fe Receivers, 72 Mo. App. 243.]

Such laws are not enacted for the benefit of railroads and are not the proximate cause of the injury. [Kirkpatrick v. Railroad, 71 Mo. App. 263, 267.]

Besides the duty of the motorman to keep a vigilant watch to see that the track is clear in a case like this is imposed by other considerations than the likelihood of loose stock being on the track. Such duty arises even at a country road crossing. This duty is imposed not only for the protection of animals but of human beings. [Spencer v. Railroad, 90 Mo. App. 91, 96.] Such duty is imposed on railroads operating on much traveled streets regardless of any ordinance. [Sluder v. Transit Co., 189 Mo. 107, 137, 88 S. W. 648, and cases cited.]

There was evidence showing that as the horse approached the car, one of the men in charge of the horses rode forward and tried to drive or scare the horse off the track but without avail.

The instructions asked by defendant on the question of contributory negligence predicates such contributory negligence on the fact that the horse having escaped from the custody and control of plaintiffs was, with plaintiffs' knowledge, on the defendant's track,

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where cars passed frequently, loose and not under his control, and that in such case defendant would only be liable for willful and intentional injury. The jury was not asked to pass on the question of whether plaintiffs and their employees used reasonable efforts to get the horse off the track after its position on the track and the approaching car made the danger apparent. There was certainly no error in refusing the instruction as asked. The plaintiffs were not guilty of contributory negligence as a matter of law in permitting the horse to break loose in the manner shown by the evidence and to continue on down the street loose but closely followed and watched by plaintiffs and his employees.

The facts in this case are quite different from those of Milburn v. Railroad, 86 Mo. 104, and other cases cited by defendant.

We think the case was fairly tried and the same is affirmed. All concur.

C. C. McCORMICK, Respondent, v. J. E. OBANION, Appellant.

Springfield Court of Appeals, February 3, 1913.

1. **REAL ESTATE BROKER: Right to Commission: Must Fulfill Seller's Requirements.** The landowner may fix the price and terms on which he will sell, and unless the broker produces a purchaser ready, willing and able to buy at that price and on those terms, the landowner may refuse to sell and the broker is entitled to no commission.

2. **———: Sale by Owner.** After allowing the broker every opportunity to make the sale on the terms fixed and the agent failing, the landowner may, as a new deal, sell the land to the same customer on more favorable terms and at a reduced price and not be liable to the broker for a commission.

3. **REAL ESTATE BROKERS: Failure of Seller to Restrict to Cash Sale.** The seller had a right to demand the entire payment of the purchase price in cash and to make that demand

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even after the broker had procured a purchaser ready, willing and able to buy at the price named on other than cash terms. But unless the seller demanded a cash payment before the consummation of the transaction, the broker was not restricted to a cash sale, to be entitled to a commission.

4. **BROKER'S COMMISSION: Executed Contract of Sale.** There is a wide difference between cases where a sale is actually consummated and where commission is claimed even though the landowner refuses to make the sale.

5. **PAYMENT: What is.** Payment of a debt need not be in money, necessarily; anything of value upon which the parties agree is considered payment.

6. **PLEADING AND PROOF: Immaterial Variance.** The plaintiff must plead the ultimate facts upon which he relies for recovery and the proof must in all material respects conform to the allegations of the complaint. But an immaterial variance is not fatal.

7. **CONTRACT: Should Plead as Modified.** Where an original contract is modified by a subsequent agreement, the plaintiff should declare on the contract as modified and not on the original contract.

8. **PARTIES TO A SUIT: Defect of.** One Davis materially aided plaintiff in finding a purchaser for the land in question under an agreement with the plaintiff that he should receive half of the commission. Defendant contended that Davis was a necessary party to the suit. Davis' testimony was that he had no contract with defendant and expected no pay from him, but from plaintiff. *Held*, that Davis was not a necessary party to the suit.

9. **PRINCIPAL AND SURETY: Recovery on Suretyship.** A surety cannot recover from the principal until he first pays the surety debt.

Appeal from Lawrence Circuit Court.—*Hon. Carr McNatt*, Judge.

AFFIRMED.

W. B. Skinner, McNatt & McNatt for appellant.

(1) Where by the contract a person agrees to sell property for a certain sum of money, nothing short of cash payment at the completion of the contract is compliance with the terms. Freight Co. v. Standard, 44

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Mo. 71. (2) If payment is to be made in other than money, it must be by agreement and pleaded, before evidence of the same be introduced. Moore v. Renick, 95 Mo. App. 202. (3) If time of payment is waived or extended, such agreement of extension or waiver must be pleaded, before any evidence of same can be introduced. Lanitz v. King, 93 Mo. 519; Larrow v. Bozarth, 68 Mo. App. 406. (4) Where there has not been a compliance of the contract, no action can be brought thereon. Veach v. Norman, 109 Mo. App. 387; Freeman v. Aylor, 62 Mo. App. 613. (5) Cannot plead one contract and show performance of another. Tausig v. Merc. Town Co., 124 Mo. App. 220; Koontz v. Car Co., 203 Mo. 259. (6) The fact that the owner consented to sell the property on different terms from that originally authorized to sell, even though the sale was procured by the broker, is not of itself sufficient acceptance of performance of the broker's obligation, to authorize a recovery on the contract. Reiger v. Fitzpatrick, 29 Mo. App. 421; Simmons v. Oneth, 140 Mo. App. 273; Cosgrove v. Leonard Merc. Co., 175 Mo. 110. (7) An agent authorized to sell real estate on cash payment is not complying with his authority if he sells on time, and it would be substantial variance and the agent could not recover. Harwood v. Tripplett, 34 Mo. App. 273; Jepson v. Marohn, 21 L. R. A. (N. S.) (S. D.) 935. (8) Where a broker sells property on different terms than the one originally authorized by the owner of property, it must be pleaded and proven, that the owner accepted the modified terms, as a compliance of the contract between the broker and the owner, to recover the stipulated amount of commissions. Blackwell v. Adams, 28 Mo. App. 62.

H. H. Bloss for respondent.

(1) If property is placed in the hands of a real estate dealer, he is entitled to his commission, if he

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brings about the sale by his exertion, or if he introduces the purchaser, or gives his name, whereby the sale is perfected by the principal, even though the owner vary the terms from the first negotiations in order to affect a sale. Wetzell & Griffith v. Wagoner 41 Mo. App. 516; Larow v. Bozarth, 68 Mo. App. 406; Stinde v. Blesch, 42 Mo. App. 578; Gretcher v. McCormick, 79 Mo. App. 325; Crone v. Trust Co., 85 Mo. App. 607; Jones v. Berry, 37 Mo. App. 125, 128; Henderson & Jones v. Mace, 64 Mo. App. 393; Baucamp v. Higgins, 20 Mo. App. 514; Simmons v. Oneth, 140 Mo. App. 273; Sallee v. McMurry, 113 Mo. App. 253. (2) It is also held that in cases of executed sales, the broker is entitled to his commission based on the original contract of employment, where the owner himself varies the terms of the sale, at which he had authorized the broker to make it. The recovery in such cases is on the original contract. Wetzell & Griffith v. Wagoner, 41 Mo. App. 510; Henderson v. Jones & Mace, 64 Mo. App. 393; and other authorities above cited, under point one. (3) The principal cannot recover of the surety until he pays the surety debt. Herne v. Keath, 63 Mo. 84; Huse v. Ames, 104 Mo. 91.

STURGIS, J.—This is an action by the plaintiff as a real estate broker for his commission for selling the defendant's farm. The plaintiff recovered in the trial court and the case is here on appeal.

The petition, after stating that plaintiff was engaged in the real estate business and that defendant was the owner of the farm in question, charges as follows:

"That on the ——— day of June, 1911, he entered into a contract with the defendant, not in writing, whereby it was agreed that if the plaintiff would procure a purchaser for the defendant's farm, which was located about four miles south of the city of Aurora,

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in Barry county, Missouri, that he, the defendant, would pay the plaintiff all that said farm sold for over and above the sum of $6000.

"That after the making of said contract, the plaintiff immediately went to work to secure a purchaser for said farm and who purchased the same at the agreed price and sum of $6800 whereby there became due from the defendant to this plaintiff the sum of eight hundred dollars which sum is now due and owing by the defendant to the plaintiff, and payment thereof has been refused by the defendant though he has been requested to pay the same to the plaintiff."

The facts in regard to the transaction are about these: The plaintiff was engaged in the real estate business at Aurora, Missouri, and the defendant was the owner of a farm some three or four miles south of that town in Barry county. The plaintiff's version of the contract with reference to the sale of the land is that he met the defendant in Aurora, Missouri, and that defendant listed the farm with him for sale at $6000. After listing the property plaintiff asked defendant about the commission and defendant said that he would not pay a commission but would give plaintiff all over $6000 he could sell the farm for. With reference to this matter the defendant testified that, on meeting the plaintiff at Aurora, plaintiff asked him to give him a chance to sell his farm and defendant replied, "All right, sell it. I will give you a commission." Plaintiff then asked, "What is the least money it will take to buy your farm?" Defendant replied, "I will take $6000 clear cash money for the place." . . . "I meant for him to sell the place and leave me $6000 clear cash after the expenses were all paid."

After this arrangement was made the plaintiff took one Webbena, whose home was in Iowa, and showed him defendant's farm with the view of selling

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it to him. They met the defendant at his farm and with reference to what then took place the defendant testified: "It went on then until he brought a buyer out there for me; brought Mr. Webbena and his wife, and looked over the place, and he praised the place up to them pretty high, and they could not agree for some time, and they did finally agree, so they told me, and agreed on $6800 in notes; three years after, some of them, one of them to be paid each year. Then he (plaintiff) called me to one side and said, 'We will sell your place that way.' I studied a few minutes and I considered this is necessary interest, and I thought this $800 will be his commission."

Defendant further explained that he understood that the $6800 was to be paid, $100 cash, $400 on the 15th day of November, and $2800 on January 12 following; and that at the time of this last payment he was to make a deed to the farm, deliver possession of it and take notes, secured by deed of trust, for the balance of the purchase money. On further examination defendant admitted that he agreed to sell his farm in this way and on these terms.

By agreement between the parties they met at an office in Aurora that same evening, when and where they drew up and signed the following contract:

"Aurora, Mo., June Seventh, 1911.

"This evidences a contract made and entered into the day and year above mentioned, by and between J. E. Obanion, of Barry county, Mo., party of the first part, and Fred Webbena, Martelle, Iowa, party of the second part. Which provides as follows to-wit:

"For and in consideration of the sum of $6800 (sixty-eight hundred dollars), to be paid by the party of the second part, as hereinafter provided. Said first party hereby agrees to bargain, sell and convey to, and hereby obligates himself to bargain, sell and

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convey to, said second party the following described real estate being situated in Barry county, Mo., to-wit: The north half of the southeast quarter, and the southwest quarter of the northeast quarter of section number one, township number twenty-five, and range number twenty-six; also the northwest quarter of the southwest quarter of section six, township twenty-five, R. 25 west, of the fifth principal meridian, all in Barry county, Mo. And in consideration of the obligation on the part of the first party the said second party hereby obligates himself to pay said first party the sum of sixty-eight hundred dollars, in manner and form as follows, to-wit: One hundred dollars cash upon the execution of this contract, four hundred dollars, to be paid November fifteenth, 1911, for which a promissory note is to be made, twenty-eight hundred dollars, January the twelfth, 1912, at which latter date the party of the first part is to convey said land by good and sufficient warranty deed to said second party and to deliver to him the possession of said real estate. And the balance of said purchase money being $3500 is to be evidenced by four promissory notes, to be executed by said second party in the respective sums of $875. The first of said notes to fall due, November 15, 1912, and one each year thereafter, all of said notes to bear interest at the rate of 6 per cent per annum, said interest to be paid annually, and the said notes to be secured by a trust deed in the usual Missouri form on the real estate conveyed, said notes and deeds to be executed at the time of said warranty deed.

"In evidence of the foregoing agreement the said parties have hereunto subscribed their names, the day and year first aforesaid.

"J. E. OBANION (Seal).
"FRED WEBBENA (Seal).

"Witness:
"C. C. MCCORMICK.
"A. M. DAVIS."

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On the making of this contract it seems that the $100 in cash was paid and the note executed for the $400 to be paid November 15, 1911, and also the note for the $2800 due January 12, 1912, which were afterwards paid when due. After this was done the plaintiff said to the defendant that there is about $800 of this coming to us and the defendant replied, "Gentlemen, aren't you a little too fast. I was to have $6000 in cash." The evidence then shows that some effort was made to sell the notes for cash but without avail. Nothing was done further at that time about the commission. The defendant then made a deed to the farm to the purchaser and took his notes for the balance of the purchase money, secured by deed of trust on the land as provided in the contract.

At the time this suit was brought the defendant had received $3300 of the purchase money, had executed the deed to the purchaser and delivered to him possession of the farm and held four notes of $875 each, secured by a deed of trust on the land.

There is some question as to a counterclaim for $400 set up by the defendant, growing out of the fact that plaintiff collected the note for $400, the same being turned over to him for that purpose; and had used the money for his own private use, afterward borrowing a like amount on his own note, signed by the defendant as surety and which money was paid to the defendant; and also as to there being a defect of parties plaintiff, in that one Allen Davis was entitled to one-half of the commission due from the defendant. Leaving out of view for the present these collateral questions, the principal question to be solved is the right of plaintiff to recover his commission on the pleadings and facts as above stated.

Two reasons are advanced by defendant why plaintiff should not be allowed to recover: (1) That plaintiff is not entitled to any commission under the facts stated, because under the contract plaintiff was

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not to have a commission, unless, through his efforts, the land was sold for over $6000, which, in the absence of any express agreement, the law construes to be six thousand dollars in cash; whereas the land was not sold for $6000 in cash but for the most part in notes. (2) That, conceding plaintiff's right to recover, he can not recover on this petition because he alleges his compliance with a contract to sell for more than $6000 (which will be construed to mean cash), and the evidence does not show a cash sale; that plaintiff cannot recover on the original contract (to sell for cash), but if he recovers at all it must be on the contract as modified by the parties, and this modification (from cash to credit) must be pleaded. Of these in their order.

I. In discussing the first proposition it must be kept in mind that plaintiff is suing on an executed contract of sale. The contract of sale was made directly by the seller with the purchaser and not by the agent and hence any alleged modification was made, if at all, by the defendant himself. There is much difference between this case, where the sale was actually consummated, and cases where the commission is claimed notwithstanding the landowner refuses to make the sale. There is no doubt but that the landowner may fix the price and terms on which he will sell, and, unless the broker produces a purchaser ready, willing and able to purchase at the exact price and on the exact terms imposed, the landowner may refuse to sell and no commission will be earned. Such are the cases of Harwood v. Triplett, 34 Mo. App. 273; Jepson v. Marohn, 21 L. R. A. (N. S.) (S. D.) 935, and cases there collated; and defendant in availing himself of the cases there cited should have noted the remark of the editor: "It will be noted that a wholly different question is involved in those cases where the owner consummates the sale." So in this case, if the defendant had insisted that the contract meant $6000 in cash, as

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he had a right to do (Southwestern Freight Co. v. Stanard, 44 Mo. 71, and Millan v. Porter, 31 Mo. App. 563, 574), and had refused to make a sale except for cash, no commission would be due the plaintiff for the simple reason that he had not complied with the terms of the contract.

It will also be noted that this is not a case where the owner insists in good faith on the exact price and terms of his contract and refuses to make a sale to the broker's customer on any modified terms, and, after fairly allowing the agent every opportunity of consummating the sale on the terms fixed and he has failed to make the sale, then as a new deal sells to the same customer at a reduced price or on more favorable terms; for in such cases no commission is earned. [Stevens v. Bacher, 162 Mo. App. 284 (141 S. W. 1143); Hughes v. Dodd, 164 Mo. App. 454 (146 S. W. 446); Blackwell v. Adams, 28 Mo. App. 61.]

In this case little if anything was said about modifying the terms of sale and there was little or no insistence on a cash payment. The broker and buyer evidently had some conversation about the terms of payment and reported to the defendant on what terms he could make payment. The defendant promptly and readily accepted the proffered terms. As defendant states it, "I studied a few minutes and I considered this is necessary (*sic*) interest and I thought this $800 will be his commission." He was getting $100 cash and was not to make a deed or surrender possession of the land till $3200 more was paid and the balance secured by this land. It would seem that the only thing to think about was the rate of interest. The defendant was evidently anxious to make the deal on these terms as the evidence shows that, on the $400 note becoming due in a short time, he unnecessarily became uneasy about its collection even before its maturity lest the buyer might prove insolvent, forfeit what he paid in cash by refusing

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further payment, thus letting him keep the land and forfeit.

No objection was made as to the purchase price not being in cash until after the written contract above mentioned was executed and plaintiff spoke about his commission being due; and defendant then replied that he was too early as he had not received his money in cash. It is not necessary for us to decide whether the commission was then due or whether plaintiff must wait to see whether the other payments, provided by the contract to be made before the deed was to be executed and the sale consummated, were in fact made. Had the purchaser defaulted in these preliminary payments and proved insolvent it may well be doubted whether the commission would have been earned. This proposition finds support in the case of Reiger v. Bigger, 29 Mo. App. 421, which was a suit for commission where the purchaser defaulted. [See also Zeidler v. Walker, 41 Mo. App. 118; 19 Cyc. 252-3.]

It may also be mentioned in this connection that while payment ordinarily means in money and he to whom it is due may insist that nothing else is payment, yet, "The payment of a debt need not necessarily be in money, but anything of value which the parties agree shall be accepted or go in payment of a debt will be treated accordingly. Thus it is that a check or the note of a third person will, when so expressly agreed, be treated as payment or satisfaction of a debt. Our reports are full of such decisions." [Rider v. Culp, 68 Mo. App. 527, 530.]

In Millan v. Porter, 31 Mo. App. 563, 574, where the broker's contract was to sell for $4000, nothing being said as to cash or on time, the court said:

"Defendant takes the position that the price of the property was to be paid in cash and that the case is just the same as if he had instructed the plaintiff to sell for the price in cash. To this position we can-

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not agree. Since the defendant fixed only *one* term of the proposed sale, all the other terms were left open to be afterwards fixed at his pleasure. He indeed had the right to demand the payment of the entire purchase price in cash, and to make the demand even after the plaintiffs had procured a purchaser ready, able, and willing to buy at the price named on other terms than a cash payment. But until a demand for a cash payment was made, the plaintiffs were not limited to such a payment; they were only required by their contract to find a purchaser at the price fixed by the defendant and on such terms in other respects as might be agreeable to the defendant."

If this case be good law, and we think it is, it disposes of both contentions of the defendant, for the contract did not necessarily call for a cash sale, but left that to be adjusted between the owner and purchaser; and there was no *modification* of the contract by subsequent agreement but rather a making definite that which had been left open for future adjustment.

The law is well settled that where the owner consummates a sale to a purchaser produced by the broker, he is liable for the commission, although he voluntarily varies the original terms imposed on the broker. [Henderson v. Mace, 64 Mo. App. 393, 396; Wright & Orrison v. Brown, 68 Mo. App. 577, 582; Crone v. Trust Co., 85 Mo. App. 601, 606; Sallee v. McMurray, 113 Mo. App. 253 (88 S. W. 157); Simmons v. Oneth, 140 Mo. App. 269, 272 (124 S. W. 534); Wetzell v. Wagoner, 41 Mo. App. 509, 516; Grether v. McCormick, 79 Mo. App. 325, 332.]

This principle should certainly be applied to a case like this, where the owner at once and without objection or insistence on the rigid terms of the contract yields to the suggestion of the purchaser as to fixing the terms at deferred payments, instead of demanding all cash.

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II. On the question of pleading it will be observed that the petition alleges that defendant agreed that if plaintiff would procure a purchaser for his farm he would pay him all said farm sold for over and above $6000; and that he found a purchaser who purchased it at $6800.

If this pleading be taken at what the pleader intended and what would ordinarily be understood from reading it, it would be held to cover a sale either for all cash or all or partly on time. [Millan v. Porter, 31 Mo. App. 563, 575.]

The rule of law is as contended by defendant, that, where the original contract is modified by a subsequent agreement, the plaintiff should declare on the contract as modified. [Lanitz v. King, 93 Mo. 513 (6 S. W. 263); Taussig v. Mill & Land Co., 124 Mo. App. 209, 220 (101 S. W. 602).]

The reason given for this rule is that defendant is only called upon to refute the cause of action pleaded and cannot be expected to be ready to refute any different cause of action. [Veatch v. Norman, 109 Mo. App. 387, 394 (84 S. W. 350).]

But we think this case does not come within that rule. It is nearer a case of variance between the pleading and proof. The gist of the action is the finding of the purchaser and the making of the sale for the sum agreed upon. [Clifford v. Myer, 6 Ind. App. 633.] The manner of making payment of the purchase price is not one of the ultimate material facts to be alleged. The requirement is that plaintiff must plead the ultimate facts upon which he relies for a recovery, and the proof must in all material respects conform to the allegations of the complaint. [19 Cyc. 275.] The cases there cited show that it is not every immaterial variance that is held fatal. In one case cited (Clark v. Allen, 125 Cal. 276, 57 Pac. 985) it is held that an allegation that a broker was employed to find a purchaser and did so, is satisfied by proof that

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he found a person with whom the owner *exchangea* lands. This is nearer a variance from the contract sued on than is the case at bar. [See also Stinde v. Blesch, 42 Mo. App. 578.]

On the whole we think the ends of justice will be best served by refusing to let the case be stranded on so barren a technicality.

III. The other errors complained of are of less moment. As to a defect of parties plaintiff, it appears that one Allen Davis materially aided the plaintiff in finding the purchaser and that plaintiff promised him half the commission. He was a witness and testified that he had no contract with defendant and did not look to him for any pay, that the arrangement to divide the commission was altogether between him and plaintiff. This is sufficient to relieve defendant of any liability to him.

As to the counterclaim, the facts are that when the $400 note was about due defendant was fearful lest it might not be paid; and, to lend a sort of halo of innocent purchaser to it, it was arranged to indorse the note to plaintiff and let it go through the bank for collection. This was done and the note collected but the collecting bank deducted two dollars for its charges. Plaintiff used this money for his own private use, doubtless intending to apply it on his commission. On defendant's objection and demand of the money, plaintiff borrowed a like amount from the bank on his own note with defendant as surety and paid it over to defendant. This note was still in the bank unpaid at the time of trial and plaintiff acknowledged it as his note and offered to pay it if defendant would pay his commission. It goes without saying that the surety cannot recover of the principal until he first pays the surety debt. [Hearne v. Keath, 63 Mo. 84; Huse v. Ames, 104 Mo. 91 (15 S. W. 965).]

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The trial court did right in holding that the defendant could not recover on this counterclaim.

No material error being found the judgment is affirmed. All concur.

A. P. HAMILTON, Appellant, v. M. F. DAVISON, Respondent.

Springfield Court of Appeals, February 3, 1913.

1. **REAL ESTATE BROKER: When Entitled to Commission.** The owner thereof placed certain real estate in the hands of a real estate agent to sell. The latter exerted himself to find a buyer, found one and brought him and the owner together with the result that a negotiation ensued which led to a sale. *Held*, that the broker was the procuring and efficient cause of the sale and was entitled to compensation therefor, even though the bargaining and selling were done by the owner without further assistance from the agent.
2. **REAL ESTATE: Direct or Indirect Transfer.** The vendor cannot defeat the broker's right to a commission by conveying the property to a third person for the benefit of the customer.
3. **TRIAL COURT: Its Finding.** The judgment of a trial court should not be disturbed if there is evidence to support it.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. D. E. Blair*, Judge.

AFFIRMED.

Shannon & Phelps for appellant.

(1) To be entitled to a commission on the sale of real estate an agent must be the procuring cause of the sale. McCrory v. Kellogg, 106 Mo. App. 597; Van Dyke & Co. v. Walker, 49 Mo. App. 381; Ramsey v. West, 31 Mo. App. 676; Sublette v. Lowe, 152 Mo. App. 190; Campbell v. Vanstone, 73 Mo. App. 84. (2) It is not sufficient for an agent to show that his efforts

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were one of a chain of causes culminating in a sale. He must show that his efforts were the procuring cause. Real Estate Co. v. Real Estate Co., 144 Mo. App. 625. (3) It is not enough for the agent to put a customer on the track of property which the principal wishes to sell, or to put the principal on the track of a possible customer. The broker must bring the parties together. Lawrence v. Wier, 33 Pac. (Colo.) 646; Sievers v. Griffin, 13 Ill. App. 63; Walton v. McMorrow, 175 N. Y. 493, 67 N. E. 1090; Hamilton v. Gillender, 26 App. Div. (N. Y.) 156, 49 N. Y. S. 663; Wyckoff v. Bissell, 24 App. Div. (N. Y.) 66, 48 N. Y. S. 1018; Fraser v. Brown, 33 Misc. (N. Y.) 591, 67 N. Y. S. 966; McNulty v. Rowe, 28 Misc. (N. Y.) 523, 59 N. Y. S. 690.

J. H. and *W. E. Bailey* for respondent.

(1) It is a well-settled rule of law in this State that where an agent introduces the purchaser or discloses his name to the seller and through such introduction or disclosure negotiations are opened and the sale of the property is effected, the agent is entitled to his commission, though the sale is made by the owner. Merton v. Case Co., 99 Mo. App. 634; Tyler v. Parr, 52 Mo. 249; Henderson & Jones v. Mace, 64 Mo. App. 393; Boss v. Jacobs, 63 Mo. App. 396; Witzell v. Griffith & Wagoner, 41 Mo. App. 516; Bell v. Kaiser, 50 Mo. 150; Bassford v. West, 124 Mo. App. 248. (2) The agent is entitled to his commission if he is the procuring cause of the negotiations which resulted in the sale, even though the agent does nothing more than bring the parties together for purpose of negotiating and the negotiations are afterward conducted or concluded by the principal. Sallee v. McMurry, 113 Mo. App. 264. (3) The vendor cannot defeat the broker's right to a commission by conveying the property to a third person for the benefit of the customer. 19 Cyc. 263.

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ROBERTSON, P. J.—Plaintiff sued the defendant in the circuit court and alleged two causes of action: one seeking to recover $130.19 on account of rents and insurance premiums collected by defendant for plaintiff, less a sum paid by defendant as the plaintiff's agent; and the second count sought to recover $190.10 on account of defendant's transactions in connection with plaintiff's pasture land in charge of the defendant.

Defendant admitted the indebtedness charged in the first count and interposed a general denial as to the second count, and by way of counterclaim defendant alleged that he was in the real estate business in Carthage, Missouri, and that the plaintiff listed with him for sale a certain tract of land consisting of 110 acres, and that he did thereafter procure a purchaser who bought said real estate, and asked judgment in the sum of $258.75.

Plaintiff replied to this counterclaim by a general denial and admitted that he was the owner of the land and alleged that he conveyed the same to a third party and that said third party conveyed the land to the purchaser produced by defendant, and that if the third party received the title from the plaintiff to said land for the purpose of conveying to the purchaser procured by the defendant there was no fraud in using the said third party as a conduit for the conveyance of the title to said land.

The land was sold at $85 per acre and it was agreed at the trial that the usual and customary commission in that locality was 5 per cent on the first thousand dollars of the purchase price of real estate and 2½ per cent on all the balance.

The trial was had to the court and the judgment was for the plaintiff on the first count of his petition for the full amount claimed, for the defendant on the second count of plaintiff's petition, and for the defendant on the counterclaim for the full amount sued

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for, thus making a general judgment in favor of the defendant for the difference between the amount due from him to plaintiff on the first count and the sum due to him from plaintiff on the counterclaim.

Plaintiff in due time perfected his appeal to this court; and as there were no declarations of law asked by either of the parties and none given by the court, the case is here solely upon the insistence of appellant that under all of the testimony the judgment should have been for the plaintiff upon the counterclaim. The judgment of the trial court should not, therefore, be disturbed if there is evidence to support it. [Dolphin v. Klann, 246 Mo. 477, 151 S. W. 956, 959.]

The testimony discloses that the plaintiff listed his land with defendant at the price of $80 per acre about two years previous to the negotiations that led to this controversy. At that time there was a conversation as to the commission. Defendant advertised the land in his regular pamphlet or list, as he designated it. There were some efforts made by defendant to sell the land and in October, 1911, the prospective buyer involved in this case came to defendant's office and inquired about this particular tract of land and wanted to know if defendant had it for sale; defendant advised him that he had but stated that since it was listed with him so long prior and lands having advanced in value, he preferred to write to the plaintiff, who was then temporarily absent from Carthage, and told the prospective buyer that if he meant business he would take it up with the plaintiff immediately. The purchaser told him to get the best price and he would buy it if satisfactory. Defendant thereupon wrote to plaintiff advising him that he had a "real buyer" and asked him to make a price on the land. Plaintiff did not answer this letter but after about a week or ten days he arrived in Carthage and went immediately to the office of the defendant, where defendant told him that he had a "real buyer" for the land and advised

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plaintiff that he wanted him to protect him in the regular commission, and also told plaintiff at that time that if they would get busy they could sell the place, and gave him the name of the prospective purchaser. Plaintiff then said that if he sold to the prospective purchaser he would protect the defendant in his commission.

In a few days thereafter plaintiff returned to the office of defendant and advised the defendant that the prospective purchaser had spoken to him about the purchase of the land and that they were going out to the land in a day or two as the prospective purchaser wanted to look it over again. In about a week thereafter plaintiff again came to defendant's office and told defendant that the prospective purchaser was coming to the office and that he had sold him the land at $85 per acre, provided the prospective purchaser would pay the defendant's commission. Defendant then advised plaintiff that he was not looking to the prospective purchaser for his commission, that his contract was not with the prospective purchaser but with plaintiff. The prospective purchaser did appear at defendant's office soon after this conversation between plaintiff and defendant and after the three there talked over the proposition the defendant said that he would be reasonable about his commission and in order to put the sale through would take a little less than the regular commission, offering to make it $150. The prospective purchaser said he would not pay more than $85 per acre for the land and the plaintiff said he could not sell him the farm.

Defendant testified that every time the prospective purchaser came to him he tried to perfect the sale and the prospective purchaser testified that he had been wanting this land for fifteen years and was never able to get it, and it is also apparent that plaintiff was, as above stated, wanting to sell. The plaintiff testified

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that he was in the defendant's office every day while the negotiations were on for the sale.

There is considerable testimony in the case as to the transfer of this property by the plaintiff to some other party and by that party to the prospective purchaser procured by defendant; and giving the defendant the benefit of all presumptions and the most favorable construction of the testimony, it is apparent that this was in reality a sale to the prospective purchaser and that the plaintiff so understood it when he made the conveyance.

On this state of facts the plaintiff insists that the respondent was not the procuring cause of the sale and insists solely upon that proposition here, relying upon the principle of law as announced in the case of Bassford v. West, 124 Mo. App. 248, 257, 101 S. W. 610, that "it is essential that the broker should have been the procuring and efficient cause of the sale" to entitle him to his commission. Judge GOODE, who wrote the opinion in the Bassford case, says: "In all the cases we have found in which brokers recovered commissions for the sale of property, on proof of no other services in connection with the sale than finding and introducing the buyer to the owner, it appeared that the owner had previously placed the property in the hands of the agent to sell; that the latter had exerted himself to find a buyer and had found one, and brought him and the owner together with the result that a negotiation ensued which led to a sale. Both on principle and on cases of controlling authority, a broker earns his commission by introducing the customer under those circumstances, even though the bargaining and selling are done by the owner without further assistance from the agent." To the same effect, also, are the opinions in the following cases: Bass v. Jacobs, 63 Mo. App. 393; Merton v. J. I. Case

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Co., 99 Mo. App. 630, 74 S. W. 434; and Wetzell & Griffith v. Wagoner, 41 Mo. App. 509.

Under the facts in this case we have no hesitancy in holding that the defendant was the procuring and efficient cause of the sale which was made of plaintiff's property and that he should be compensated therefor. The judgment is affirmed. All concur.

KIRKEBY AND GUNDESTRUP SEED CO., Respondent, v. O. T. WHITE and JOHN M. ALLEN, Appellants.

Springfield Court of Appeals, February 3, 1913.

1. **CONTRACTS: Time as of the Essence of.** Plaintiff, a foreign corporation, contracted with the defendants for a carload of onion sets at a stated price: "F. O. B. Jefferson Park, Ill. . . . for shipment *about not later* than Feb. 10, 1911. . . . If taken by December 20, five cents less per bushel. . . . If after February 10, five cents more per bushel." On January 19, 1911, defendants wrote plaintiff that they canceled the contract. Defendants refused to agree to cancellation. Several letters were exchanged, silent as to time of shipment. On February 10, 1911, plaintiffs loaded sets on car at Jefferson Park, Illinois, February 17, the car reached its destination. Defendant refused to accept it. Plaintiff sold sets to another party and sued for the difference between the contract price and the amount received from the sale to the third party. *Held*, that time was not of the essence of the contract as to the defendants.

2. ———: **Construction of: Intent of Parties.** In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if time appears from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be *held* to be conditions precedent.

3. ———: **Terms Construed by Parties to.** Where parties to a contract have given its terms a particular construction, such construction will generally be adopted by the court in giving effect to its provisions.

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4. ———: **Breach of.** When a purchaser breaches a contract and refuses to accept the chattels sued for, the seller may treat the sale as ended by the purchaser's default, and need not make any delivery or tender of the articles sold.

5. **BREACH OF: Remedies.** The seller has two remedies: (a) He may dispose of the property for the purchaser's account, protecting, as far as possible, the purchaser's interests and obtaining the best price. (b) The seller may keep or dispose of the goods as his own; and his damages would be the difference between the contract price and the market value.

6. **CORPORATIONS: Foreign Corporations: Interstate Commerce.** Plaintiff, a foreign corporation, was engaged in interstate commerce and was therefore not amenable to Rev. Stat. 1909, sec. 3039.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. D. E. Blair*, Judge.

AFFIRMED.

Edgar B. Chestnut for appellants.

(1) The plaintiff was a foreign corporation engaged in doing business in this State in violation of the provisions of sections 3038 and 3039, R. S. 1909. Parke Davis & Co. v. Mullett, 149 S. W. 462; Fay Fruit Co. v. McKinney Bros. & Co., 103 Mo. App. 304. (2) Time is of the essence of the contract, and plaintiff failed to show compliance with the stipulations as to the time of shipment. 1 Beach Mod. Law of Contracts, sec. 783; Orange Growers' Assn. v. Gorman, 161 Mo. 211; 35 Cyc. 175-178; Ledon v. Havemeyer, 24 N. E. 299.

Pearson & Butts for respondent.

(1) Defendants have not established that this transaction was doing business in this State, within the meaning of sections 3038 and 3039. 7 Cyc. 416; 9 Cyc. 670, note 17; Text Book Co. v. Gillispie, 229 Mo. 397; Koenig v. Boat Mfg. Co., 155 Mo. App. 685; Hogan v. St. Louis, 176 Mo. 156; 9 Cyc. 668, note 11, 669;

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Shoe Mchy. Co. v. Ramlose, 210 Mo. 655. (2) The limitation as to time of shipping was a limitation upon the defendants, and not the plaintiff, if time were of the essence, which it was not. Metal Fireproof Co. v. Cement Co., 123 Mo. App. 715; Steam Heating Co. v. Bissell, 41 Mo. App. 426; Tuft v. Morris, 87 Mo. App. 98. (3) Plaintiff was within his rights in reselling. Laswell v. Handle Co., 147 Mo. App. 497; Carriage Co. v. Gilmore, 123 Mo. App. 19; Oehler v. Fruit Co., 162 Mo. App. 446; Koenig v. Boat Mfg. Co., 155 Mo. App. 685; Range Co. v. Mercantile Co., 120 Mo. App. 447. 4. The defendants positively repudiated the contract and declared their default within the delivery season. Oehler v. Fruit Co., 162 Mo. App. 446; Laswell v. Handle Co., 147 Mo. App. 522. 5. And plaintiff had the right to keep or dispose of the goods as its own, and its damages would be the difference between the contract price and the market value. Laswell v. Handle Co., 147 Mo. App. 497; Koenig v. Boat Mfg. Co., 155 Mo. App. 685; Range Co. v. Mercantile Co., 120 Mo. App. 447. 6. "A sale, the parties to which are of different States, is a transaction of interstate commerce, wherever the contract may be made." 7 Cyc. 416; 9 Cyc. 670; note 17; Text Book Co. v. Gillespie, 229 Mo. 397, holding the statute does not apply to interstate commerce. Koenig v. Boat Mfg. Co., 155 Mo. App. 685.

ROBERTSON, P. J.—Plaintiff sued the defendants in the circuit court to recover the difference between the contract price for a carload of onion sets, ordered from it by defendants to be shipped from Chicago, and the price the plaintiff was able to sell same for after defendants had refused to accept them, said difference amounting to $528.40. A jury was waived and the trial was had to the court. At the close of all the testimony, the defendants requested a declaration of law that under the pleadings and the evidence the

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plaintiff was not entitled to recover, which was refused and judgment entered for the sum sued for, and the case is here on the question of the refusal of this instruction.

It was admitted at the trial that the plaintiff was a foreign corporation at the time the contract in controversy was entered into and that it had not, prior to the signing of the contract, complied with the statute (section 3039 of the Revised Statutes of Missouri of 1909) in regard to taking out a license to do business in this State, and that the plaintiff was not authorized, under the laws of this State, at that time nor thereafter, under the provisions of said section to do business in this State.

The contract involved is as follows:

"White & Allen,

Joplin, Mo.

No contract or special agreement recognized by this House unless noted on this order.

....

All orders taken subject to the approval of the House. This order is not subject to countermand.

Order No. 629. Date Billed .....19..

Bought of Kirkeby & Gundestrup Seed Co.,

4273 Milwaukee Avenue,

Branch, 10818 Michigan Avenue.

Warehouse, Norwood Park Ave. & C. & N. W. Ry. Tracks.

Chicago, Ill.

For shipment about not later than Feb. 10, 1911 (weather permitting):

70 bu. Red Bottom Onion sets, at, per bu. $1.25

696 bu. Red Bottom Onion sets, at, per bu. 1.25

34 bu. White Bottom Onion sets, at, per bu. 1.50

A bushel of sets to consist of 32 lbs. at time of shipment. f. o. b. Jefferson Park, Ill.

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All to be choice clean sets, screened through one inch mesh and full delivery.

Bags, 5 cents. If taken by Dec. 20, 5 cents less per bushel. If after Feb. 10, 5 cents more per bushel than the above prices.

Aug. 11, 1910.

White & Allen,
Per O. T. White,

Bags at Value.
Terms—Cash Bill of Lading.
No discount.

Kirkeby & Gundestrup Seed Co.
W. K.

Ship via .....

This contract is subject to terms and conditions on back hereof, which are hereby agreed to. (over)

It is agreed Kirkeby & Gundestrup Seed Co. shall not be held liable for damages for the nonfulfillment of this contract in case the mentioned sets are destroyed by fire or other unavoidable cause.

It is further agreed that the said herein Kirkeby & Gundestrup Seed Co. will care for this stock, keep it in the same warehouses and give it the best attention and care, the same that they give any unsold portion of their crop.

If a portion of the above sets are destroyed, Kirkeby & Gundestrup Seed Co. will ship the balance of the contract.

Delivery to be made as near the date specified as weather will permit. Stock to be in good merchantable condition when shipped.

After carrying these sets in store till about shipping time Kirkeby & Gundestrup Seed Co. will not entertain a proposition to cancel the order.

These sets are not sold delivered, the buyer pays the freight.

Purchasers to pay for containers at value."

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The testimony discloses that at the instigation of the Springfield Seed Company, presumably a concern of this State, the plaintiff mailed this contract to the defendants, which they received and signed at Joplin on August 11, 1910, returning it to the plaintiff at Chicago. This contract was a printed form and the words "not later than Feb. 10, 1911" were written in a blank space thereon.

On January 19, 1911, the defendants wrote the plaintiff a letter in which they stated that they cancelled the above order. To this letter plaintiff replied that they could not cancel the order for the reason that they covered all contracts in the summer and had the sets in their warehouse at Chicago ready to go out as specified; that they handled the sets on a small margin and could not take chances on the winter market; that they didn't make anything extra by a decline in prices afterwards, and stated that the car of sets would go forward about February 10; and also stated that they had no travelling men and no facilities for selling the sets at that time, as they did all of their selling in the spring and summer. Defendants answered this letter of plaintiff's stating that if plaintiff shipped the car of sets to Joplin plaintiff would have to dispose of it, and again positively stated that they concelled the order. Plaintiff replied to this letter on January 26, 1911, stating that the car would go forward as specified in the contract and if the defendants refused to accept the sets that plaintiff would sue defendants for the full amount of the bill, giving them credit for whatever might be realized by reselling the car.

On February 10, 1911, plaintiff loaded the sets on board the cars according to the contract, putting in sixty bushels of sets extra without charge to help the defendants out on the market. For some reason not explained by the testimony the car was not inspected nor bill of lading issued on the 10th, but on the

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following day this was done and the car went forward. Plaintiff on that day wrote a letter to defendants reciting what had been done and enclosing the bill of lading and inspection certificate. When the car reached Joplin on February 17, 1911, defendants refused to accept it and the sets were sold to another party for $500.10 which one of the defendants in his own testimony admitted was a fair price. And the next day after the sets were sold to the third party, defendants purchased about one-half of the sets from that party.

Defendants insist that under the contract and the facts and circumstances above narrated, and which are not in dispute, that time was of the essence of the contract.

"In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if time appears from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent." [Redlands Orange Growers Assn. v. Gorman, 161 Mo. 203, 211, 61 S. W. 820.]

Viewing the contract in controversy here in the light of this rule and the circumstances of the case, it will be seen that if time was the essence of this contract it was so only in behalf of the plaintiff. It is provided in the contract itself, typewritten into the printed from, that if the sets were shipped after February 10, the price should be five cents more per bushel. It is evident from this provision that at the time the contract was entered into that it would be material only to the plaintiff that the shipment should be made not later than February 10 at the price therein named.

It is also apparent from the testimony and the contract that it was contemplated at the time the con-

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tract was entered into that the plaintiff would assemble this stock of sets in cold storage and hold them at Chicago for shipment at a time convenient for the defendants.

It is evident from the testimony in this case that the defendants, when they first began to write to the plaintiff about cancelling the order, were anticipating a decline in the market; and since the defendants were in a position to enforce their contract against the plaintiff if the situation had been reversed, and because of the fact that the plaintiff was compelled, by virtue of this contract, to store and keep in storage for the defendants these goods, we do not feel that justice would be subserved by holding, under the language of this contract and the facts disclosed at the trial, that time was of the essence of this contract as to defendants and in allowing the defendants to escape payment of the judgment of the trial court.

The defendants in their answer questioned the right of the plaintiff to maintain this suit and to enforce the contract sued on for the reason that it had not obtained authority to do business in this State, and because they allege this transaction constituted doing business in this State within the meaning of our statutes. Clearly plaintiff was engaged in interstate commerce and is not amenable to section 3039, Revised Statutes 1909. [International Text Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922.]

The judgment is affirmed. *Farrington, J.*, concurs in separate opinion. *Sturgis, J.*, concurs in result in separate opinion.

CONCURRING OPINION.

STURGIS, J.—Having some doubt as to construing the contract mentioned to be one of which time is not of the essence, noting that it is a mercantile contract and the rather strong language used, I pre-

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fer to base my concurrence in affirming the judgment on the following grounds:

It is unquestioned that, prior to the time for shipping the onion sets in question, the defendants positively and unequivocally cancelled and repudiated the contract by notifying the plaintiff that they would not receive, pay for or have anything to do with the onion sets if shipped, and forbidding plaintiff to ship same.

The law is that, when a buyer breaches the contract and refuses to accept the chattels contracted for, the seller may treat the sale as ended by the purchaser's default; and in such case need not make any actual delivery or tender of the articles sold, and need not incur any labor or expense otherwise necessary in making delivery or tender. [Oehler v. Fruit Co., 162 Mo. App. 446, 142 S. W. 811, and the many cases there cited; Laswell v. Handle Co., 147 Mo. App. 497, 522, 126 S. W. 969; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210.]

In such case the seller has a choice of remedies, one of which was adopted in this case, to-wit, sell the property for the buyer's account, taking such steps as are necessary to protect the buyer's interest and obtain the best price. [Rickey v. Tenbroeck, 63 Mo. 563; Koenig v. Boat Manufacturing Co., 155 Mo. App. 685, 135 S. W. 514; Oehler v. Fruit Co., supra.]

The plaintiff therefore was not, after the defendants' positive refusal to accept same, under any obligation to ship the goods at all, much less on the exact day mentioned in the repudiated contract. That it did so, even if one day late, and thus gave defendants another opportunity to accept and pay for the goods, certainly put plaintiff in no worse position than if it had sold on the market without giving such opportunity.

The only obligation the plaintiff owed the defendants after their refusal to accept was to sell for the best price obtainable and charge defendants no more than the difference between the contract price

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and the best market price ascertained in this way. The uncontradicted evidence shows that this was done. In selling for defendants' account the plaintiff was not confined to any particular market and could certainly seek the best. The evidence showed and the court must have found that the onion sets sold better at Joplin than they would at Chicago or near there. That they bought a fair price in Joplin is conceded. It was to defendants' advantage that they were shipped and sold there. Having repudiated their contract, the defendants could claim no right except to have the fair market value of the onion sets credited on the contract price. This they have received to the full.

FARRINGTON, J. (concurring).—I desire to concur in the opinion of ROBERTSON, P. J., holding that time was not of the essence of this contract for the reasons set out in his opinion, and for the further reason that the parties put a construction on this contract which in my judgment should be controlling in this case. The rule is well-established that where parties to a contract have given its terms a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. [The St. Joseph Union Depot Co. v. C., R. I. & P. Ry. Co., 131 Mo. l. c. 305, 31 S. W. 908; Austin v. Shipman, 160 Mo. App. l. c. 213, 141 S. W. 425, and cases cited.] In this case, the defendants by their several letters written long prior to the tenth day of February indicate beyond question that the time mentioned was not a condition precedent and did not amount to a warranty that the goods would be shipped on that date.

And, to my mind, the reasons given in the concurring opinion of STURGIS, J., are equally conclusive as showing why this judgment should be affirmed.

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JOSEPH R. PILE et al., Respondents, v. STEPHEN A. ALLISON, Appellant.

Springfield Court of Appeals, February 3, 1913.

1. **APPEAL: Affidavit for.** An affidavit for appeal, made by appellant's attorney of record and in fact, fulfills the requirements of Rev. Stat. 1909, sec. 2040, as to who shall make the appeal affidavit. It is not necessary that the affidavit designate in what capacity the party making same assumes to act.

2. **INSTRUCTIONS: One Instruction Covered by Another.** All instructions are to be construed together. *Held*, in this case, that an instruction embodying the expression "in accordance with the terms of their employment" sufficiently covered all conditions of employment and cures any error occasioned by the refusal of an instruction on one particular condition.

Appeal from Jasper Circuit Court, Division Number One.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

Byron H. Coon and *I. N. Threlkeld* for appellant.

1. The agency created with plaintiffs by defendant was a special agency and plaintiffs' employment was limited by the terms thereof to the procurement of a loan from Gentiles. Story on Agency, (9 Ed., secs. 17 to 20, pp. 17 and 18, sec. 126, p. 141.) 2. The defendant had a right to decide for himself how his own business shall be conducted. Tate v. Evans, 7 Mo. 420; Judge v. Leclaire, 31 Mo. 127; Belt v. Good, 31 Mo. 128; Nesbitt v. Helsler, 49 Mo. 383; Meecham on Agency, sec. 273; Gelott v. Ridge, 117 Mo. 561; Kirkpatrick v. Wiley, 197 Mo. 169; 1 Blashfield on Instructions, sec. 90, p. 205; Stanfield v. Loan Ass'n, 53 Mo. App. 595.

E. F. Cameron for respondents.

All instructions are to be construed together and the instruction given required the jury to find every

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element necessary to make out a case of this character. 153 Mo. 232; 105 Mo. App. 709.

ROBERTSON, P. J.—Plaintiffs sue to collect from defendant a balance of $37.50 on account of a commission claimed to have been earned by them in securing for defendant a loan of $2000 from a party ready and willing and financially able to make the same, but which the defendant refused to accept after it was procured.

Defendant admits that he employed plaintiffs to procure the loan, but with the agreement with plaintiffs that the loan should not be procured from any member of a particular and then designated sect.

Plaintiffs prevailed below and the defendant has appealed.

The respondents are insisting here that this court should not entertain jurisdiction on account of alleged defects in the affidavit for appeal. One of the defendant's attorneys, and who was attorney throughout the litigation in the lower court, and is one of the attorneys of record here, made the affidavit of appeal and simply designated himself as the "agent" of the defendant. The statute (Sec. 2040, R. S. 1909) does not require the affidavit to designate in what capacity the party making it assumes to act; but as the party making the affidavit in this instance, was, as a matter of fact, the agent for the defendant acting in the apparent scope of his authority, the affidavit is evidently sufficient. [Ring v. Vogel Paint & Glass Co., 46 Mo. App. 374, 377.]

Appellant's sole contention here is that the court erred in refusing to give the instruction requested on his behalf to the effect that if the jury found and believed from the evidence that at the time the defendant applied to the plaintiffs for the loan, the defendant stated to the plaintiffs that he would not borrow money from a member of said sect in question,

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and that the plaintiffs so understood it and it was a part of the contract of employment between plaintiffs and defendant, and it was found that the plaintiffs secured one of this particular sect to make the loan, then the verdict should be for the defendant.

The jury was, however, instructed at the request of the defendant that the burden of proof was upon the plaintiffs to prove by the preponderance or greater weight of the evidence that they were employed by the defendant to procure for him a loan and that they procured said loan, or that the plaintiffs found a party who was able, ready and willing to make the defendant a loan *in accordance with the terms of their employment*, and within the time they were to procure said loan, if they found the time was fixed, and if they further found that the plaintiffs had failed to establish such facts by the preponderance or greater weight of the evidence, then their verdict should be for the defendant.

This instruction fairly presented the issues to the jury and cured the error, if any there may have been in the refusal of the first instruction. The judgment of the trial court is affirmed. All concur.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1913.

BERTIE MARIE ROBINSON, (now Bertie Marie Bennett), Respondent, v. BUDD M. ROBINSON, Appellant.

Springfield Court of Appeals, March 3, 1913.

DIVORCE: Modification of Decree: Support of Child. In June, 1907, plaintiff herein obtained a decree of divorce from defendant and, in the decree, alimony in gross was awarded, which was paid. The care and custody of a son of the marriage, then aged nine, was also awarded plaintiff, but no decree, order or judgment was entered with reference to the maintenance of the child. In June, 1912, plaintiff filed a motion asking that defendant be required, under order of court, to pay a sufficient sum to educate and maintain the child. The trial court sustained the motion, and allowed plaintiff the sum of five hundred dollars per annum for the support and maintenance of the child. The defendant appeals, contending, that since the trial court failed in the original decree to provide for the maintenance of the child, it had no jurisdiction to modify or alter the decree so as to provide for such maintenance. *Held*, that it was within the province of the trial court to make the order.

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Appeal from Jasper County Circuit Court, Division Number One.—*Hon. Joseph D. Perkins,* Judge.

AFFIRMED; CERTIFIED TO SUPREME COURT.

Spencer, Grayston and *Spencer* for appellant.

1. In the original case, the plaintiff did not ask nor did the decree award anything for the maintenance, support and education of the child, and therefore the court was without jurisdiction to make any order touching such matters in this case. Lukowski v. Lukowski, 108 Mo. App. 204; Seely v. Seely, 116 Mo. App. 362; Rev. Stat. 1909, secs. 2381 and 2375. 2. For the same reasons, the evidence did not warrant the court in making any order touching or concerning the support, maintenance and education of the child.

Fred W. Kelsey for respondent.

1. The weight of authority in Missouri supports the general rule that where no provision is made for the support of the child in the decree of the divorce, the mother may, at a subsequent term, obtain an order modifying the decree, requiring the father to provide future means for the support of the child. Shannon v. Shannon, 97 Mo. App. 119; Meyers v. Meyers, 91 Mo. App. 151; Chester v. Chester, 17 Mo. App. 657; contra, Lukowski v. Lukowski, 108 Mo. App. 204; Seely v. Seely, 116 Mo. App. 362. 2. "The rule in Missouri is well settled where the decree of divorce is silent on the subject of the children the liability of the father to support his minor children, remains in full common law vigor, though the mother is awarded their custody, as here." Viertel v. Viertel, 212 Mo. 576; Meyers v. Meyers, 91 Mo. App. 151; Cox v. Bogle, 152 Mo. 596; Lusk v. Lusk, 28 Mo. App. 91; Rankin v. Rankin, 83 Mo. App. 535; McCloskey v. McCloskey, 93 Mo. App. 398; Maxwell v. Boyd, 123 Mo. App. 334;

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Keller v. City of St. Louis, 152 Mo. 596. 3. The statute authorizing the circuit court to make orders in divorce cases is not to be strictly construed. In re Gladys Morgan, 117 Mo. 254, 9 Am. & Eng. Ency 866; 14 Cyc. 804. 4. The statute is capable of a construction which would authorize this proceeding and the construction contended for by the appellant would deny the court the right to discharge its duty to the children which are its ward. R. S. 1909, secs. 2381 and 2375; Harris v. Harris, 5 Kan. 53; Keesling v. Keesling, 135 N. E. 337; Tobin v. Tobin, 64 N. E. 624.

STATEMENT.—At the June term of the Jasper county circuit court in the year 1907 the plaintiff herein obtained a divorce from the defendant, and in the decree was awarded alimony in gross in the sum of seven thousand dollars together with certain real estate in Newton county, and the care and custody of a child of the marriage, Francis Henry Robinson, who at the time of the granting of the divorce was about nine years of age. The money was paid and the land deeded by the defendant to the plaintiff. Both plaintiff and defendant remarried, the plaintiff moving to the state of Oregon and taking with her the child. No order or provision was made in the original divorce proceeding for the maintenance of the child. At the June term of said court in the year 1912 a motion to modify the divorce decree was filed, asking that defendant be required under the order of the court to pay a sufficient amount to maintain and educate the child, and proper notice of this motion was served on the defendant. A motion for a change of venue filed by defendant being denied, the court heard the evidence and made the following order modifying the decree (formal parts omitted):

"Now comes on for hearing the plaintiff's motion to modify the divorce decree heretofore entered here-

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in, by consent the same is taken up, and being seen, heard and fully understood by the court, and the court hearing the evidence adduced by both parties, duly considering the same, being now well and fully advised in the premises, said motion is by the court sustained and the plaintiff is allowed the sum of five hundred dollars per annum for the support, maintenance and education of the child, Francis Henry Robinson, to be paid in quarterly payments of one hundred and twenty-five dollars each, the first payment to become due and payable on the tenth day of July, 1912, and a payment to become due and payable each quarter thereafter until the further order of this court.

"It is therefore ordered and adjudged by the court that the plaintiff have and recover of and from the defendant, for the support, maintenance and education of the infant child, Francis Henry Robinson, the sum of five hundred dollars per annum to be paid in quarterly payments of one hundred and twenty-five dollars each, the first payment to become due and payable on the tenth day of July, 1912, and a payment to be made on the first of each quarter thereafter, together with the costs of this hearing, and if the payments are not paid when due, let execution issue therefor."

A motion to set aside this order being denied over defendant's exception, an appeal to this court was perfected.

The original decree merely granted the divorce and fixed the alimony in gross and gave the care and custody of the child to the mother, and no order, decree or judgment was entered with reference to the maintenance of the child.

OPINION.

FARRINGTON, J.—It is contended on behalf of the appellant that because of the failure of the court

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in the original divorce decree to provide for the maintenance of the child, the court, under sections 2375 and 2381, Revised Statutes 1909, had no jurisdiction to modify the decree so as to provide for the maintenance of the child. The respondent contends that the order awarding the care and custody of the child necessarily and as an incident thereto gave the court power and jurisdiction at any time, under the facts referred to, to make the order made in this case.

Section 2375, R. S. 1909, is as follows:

"*Alimony and maintenance.*—When a divorce shall be adjudged, the court shall make such order, touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable, and when the wife is plaintiff, may order the defendant to give security for such alimony and maintenance; and upon his neglect to give the security required of him, or upon default of himself and his sureties, if any there be, to pay or provide such alimony and maintenance, may award an execution for the collection thereof, or enforce the performance of the judgment or order by sequestration of property, or by such other lawful ways and means as is according to the practice of the court. The court, on the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper, and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases."

Section 2381, R. S. 1909, is as follows:

"*Decree of divorce not subject to review—otherwise as to alimony.*—No petition for review of any judgment for divorce, rendered in any cause arising under this article, shall be allowed, any law or statute

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to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as in other cases."

It is contended by appellant that under section 2375 there could be no alteration of an order never made, and that under section 2381 there could be no review of an order or judgment never made.

An examination of the authorities in this State reveals that the St. Louis Court of Appeals, in the cases of Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274, and Seely v. Seely, 116 Mo. App. 362, 91 S. W. 979, sustains the position taken by the appellant, and that the Kansas City Court of Appeals, in the case of Shannon v. Shannon, 97 Mo. App. 119, 71 S. W. 104, sustains the position taken by the respondent, and it necessarily devolves upon us to certify this question to the Supreme Court for final determination.

All the decisions in this State on this question hold that the statutes above referred to are merely cumulative of the common law; that the granting of this mode of procedure to procure maintenance for the child does not take away from the father the common law duty and obligation to maintain and provide for the child, nor take away from the custodian of the child or any other person furnishing the child with necessaries the right to sue the father for reimbursement. We therefore take it these statutes are cumulative, and merely remedial, and only provide an additional remedy to enforce the common law duty of the father to maintain his child. This being true, it is the duty of courts to construe such statutes liberally. There is no common law right established or common law remedy taken away. The statutes only refer to the mode of procedure in obtaining maintenance for the child rather than creating any right or obligation different from that imposed at common

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law. Like the statutes creating mechanics' liens which our courts have held are merely creatures of statutory enactment, unknown to the common law, as such statutes pertain only to the remedy and not to the right of enforcing the payment of the debt, they should receive a liberal construction. [Putnam v. Ross, 46 Mo. 337; Oster v. Rabeneau, 46 Mo. 595.] Likewise, in construing the laws of administration the courts have held that where the statute pertains to the remedy and not the right it will be liberally construed. [Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432.] In the case of Heman v. McNamara, 77 Mo. App. 1, Judge BOND exhaustively treats of remedial statutes and quotes from many of the leading text-writers, the question involved being as to the right of a defendant to file a set-off or counter claim in a suit brought against him, and because the statute was remedial, the court held it was not to receive a strict construction and that the rule of *strictissimi juris* did not apply. The rule is laid down in 36 Cyc. 1173 that laws enacted in the interest of the public welfare or convenience should be liberally construed, and that statutes enacted for the correction of errors, the supply or curing of defects, the redress of existing grievances, are known as remedial statutes and should be liberally construed. On the other hand, it is stated that a statute imposing a new duty and creating a new right will be construed strictly. But statutes designed to render the methods of procedure more simple and convenient are remedial and are to be liberally construed. [36 Cyc. 1188.] "A remedial statute," says the American and English Encyclopedia of Law, (2 Ed.), Vol. 26, at page 530, "is one made to supply defects or abridge superfluities in the common law arising from the general imperfections of human laws, the change of time and circumstances, or from any other cause whatever." Such statute is distinguished from a penal statute, the latter, of course, requiring

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a strict construction, and at page 614 it is stated that where a statute only provides a new remedy for a preexisting right, it is merely cumulative. In the case of Union Brewing Co. v. Ehlhardt, 139 Mo. App. 129, 138, 120 S. W. 1193, discussing the construction to be placed on remedial statutes, this language is used: "In construing this statute, we must look to the prior state of the law on the subject, the mischief, if any, which it entailed, and the remedy therefor, which is sought to be provided thereby. . . . Thus viewing the statute, the purpose of the Legislature to simplify and further proceedings originating before a magistrate in the interests of justice, is manifest." And in the case of Shohoney v. Railroad, 231 Mo. 131, 157, 132 S. W. 1059, Judge LAMM states the "trite and venerable doctrine" to be followed by the court. In the case of Kansas City Loan Guar. Co. v. Kansas City, 200 Mo. 159, 168, 98 S. W. 459, Judge GRAVES approvingly quotes from the Rozelle case, supra. In the case of Robinson v. Harmon, 117 N. W. 664, the following is quoted with approval from Black on Interpretation of Statutes: "It is an old and unshaken rule in the construction of statute that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression will be deemed general. . . . It may be stated in general terms that any statute which gives a remedy or means of redress where none existed before, or which creates a right of action in an individual, or a particular class of individuals, is remedial within the meaning of this rule." The following appears in Black on Interpretation of Laws, at page 310: "In the next place, statutes made in relation to the administration of justice in the courts, and designed to render the same more simple, speedy, or efficacious, are to be liberally construed, for the attainment of that important object."

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Turning again to the statutes under consideration and reading them in the light of a liberal construction, it will be seen that the Legislature intended for the divorce court to take charge of the child and award its care and custody, and in order to make the care and custody effective, the Legislature wisely provided a procedure—summary, perhaps—by which the father may be required to advance the maintenance necessary for the child. It is true, if this statute is one that should be strictly construed, there could be no alteration on a motion to modify a decree for alimony, nor a review of an order or decree for the maintenance of the child, unless there had been an order made in the first instance, it being argued that there having been no order made—under a strict construction—there could be none altered. However, bearing in mind the purpose and intention of the Legislature in giving to the court the power to deal with the child regardless of the litigation between the parents, and remembering that the statute was passed for the benefit of the child and for the purpose of enforcing a common law obligation that the father owed the child, and that the statute is cumulative and remedial, so strained and strict a construction should not be placed upon it.

The Supreme Court of this State in the case of In re Gladys Morgan, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913, went so far as to hold that the divorce court could in a case pending before it for divorce between the husband and wife make an order with reference to the care and custody of a child pending the action although the petition in the case did not pray for the care and custody of the child and neither party had at that time demanded the care and custody of the child; and that although the pleadings under the statute (which was the same as it is now) contained nothing on the subject, and although there had not been an adjudication or decree in the divorce case,

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still the divorce court had jurisdiction to make an order with reference to the care and custody of the child pending the action. Surely, this was not a strict construction of the statute. The court in that case based its holding on the ground that the divorce court gets its powers with respect to children from the chancery practice and not from the ecclesiastical courts. And in the case of Cole v. Cole, 89 Mo. App. 228, Judge GOODE in discussing the statutes in question recognizes that the Supreme Court in the Morgan case has so construed the statutes.

In 14 Cyc. at page 811, we find the rule thus declared: "However, the power of the court to make an order directing the father to provide for the maintenance of the minor children under petition in the suit long after final decree has been entered is well established, where the decree contains no provision on the subject." Numerous authorities are cited in support, and among them is the case of Meyers v. Meyers, 91 Mo. App. 151, which was decided by the St. Louis Court of Appeals and afterwards overruled by the same court in the case of Seely v. Seely, 116 Mo. App. 363, 91 S. W. 979.

Taking into consideration the predicament the child is often placed in where the parents are quarreling and charging and countercharging under the various grounds of the divorce statute, and where, as frequently occurs in the fury of the battle, the innocent offspring of the unfortunate marriage who is especially the ward of the court is overlooked by the parents as well as the court in making a decree or order at the time touching its welfare, we think, from a legal, ethical and moral standpoint that the courts should construe the statutes to their full intendment for the purpose of protecting those whom they are designed to protect. It is our opinion that the Kansas City Court of Appeals in the case of Shannon v. Shannon, supra, follows the better doctrine and is

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more in keeping with the views expressed by the Supreme Court in the Morgan case. Believing that the justice of the case permits, indeed demands, a liberal construction of the statutes under consideration, we are constrained to hold contrary to the opinion of the learned judge of the St. Louis Court of Appeals in the cases of Lukowski v. Lukowski and Seely v. Seely, supra. We hold that the trial court committed no error as disclosed by this record and the judgment is accordingly affirmed, but, as this holding is necessarily in conflict with the decisions of the St. Louis Court of Appeals in the cases referred to, the cause is certified to the Supreme Court for final determination. All concur.

L. DYER, Respondent, v. W. L. COWDEN, Appellant.

Springfield Court of Appeals, March 3, 1913.

1. **SALE: Statements of Seller: As Facts or Mere Opinions.** Statements as to the quantity of a stock of goods, if made positively, as of one's own knowledge, by one apparently in a position to know the truth, which are relied upon by the person to whom made, are statements of facts and not mere expressions of opinion.

2. **———: Relied on by Purchaser.** The merchandise in question was contracted for on an invoice and not in bulk, and the purchaser had a right to rely upon any statements made by the seller in regard thereto, and if those statements were false, the plaintiff (seller) cannot recover.

3. **FRAUD: Deception by: Question for Jury.** It is a question for the jury whether the defendant was deceived or not. If there is any evidence tending to show misrepresentations and that the defendant acted upon such misrepresentations in entering into the contract and not on his own judgment, the plaintiff's (seller's) knowledge and intention become material questions which should be left to the jury, and the court commits error in taking such a case from the jury.

4. **———: Motive and Intent.** Where actual fraud is charged, the question is largely one of motive and intent, and whether there is fraud or not is a question for the jury.

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5. **VERDICT: Peremptory Instruction: Issues of Fact for the Jury.** The court should not give a peremptory instruction to find for the plaintiff if there is any evidence in the case, which, if true, would establish any one of the good defenses pleaded in the answer, but the issues should be submitted to the jury.

6. **———: Verdict Directed for Plaintiff: Effect of.** In directing a verdict for the plaintiff the court considers only the evidence favorable to the defendant; admits all of his evidence to be true; gives to his evidence every reasonable intendment and construes in his favor every reasonable inference that can be deduced from his evidence.

7. **PLEADING: General Denial.** Under a general denial, the plaintiff cannot urge a waiver on the part of the defendant of fraud or misrepresentation and a ratification of the contract.

8. **CONTRACT: Breach of: Liquidated Damages.** Where a stock of goods amounted to nine thousand dollars and the same was locked up for inventory for five days at a season of the year when trade is best, the sum of three hundred dollars is not an unreasonable amount for a breach of the contract of sale.

Appeal from Greene County Circuit Court, Division Number Two.—*Hon. Alfred Page,* Judge.

REVERSED AND REMANDED.

Albert S. Cowden, Neville & Gorman for appellant.

(1) If there was oral evidence tending to show that the amount of the stock of goods was misrepresented by plaintiff to defendant and that defendant acted upon said misrepresentations, he was entitled to have that evidence passed on by a jury and the court erred in taking the case from the jury. Owens v. Rector, 44 Mo. 389; 2 Thompson on Trials (2 Ed.), secs. 1947-1949. (2) Where, in a law case, there is any evidence, which if true, would establish any one of the defenses pleaded in the answer, it should be submitted to the jury and it is error for the court to give a peremptory instruction. Johnson v. Grayson, 230 Mo. 380. (3) Misrepresentations as to amount of property are sufficient to avoid a contract and are

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not like opinions as to value. Judd v. Walker, 215 Mo. 312; Leicher v. Keeney, 98 Mo. App. 394. (4) Defendant had a right to rescind the contract within a reasonable time after he discovered the fraud and the question of what was a reasonable time under the circumstances in this case was a question of fact for the jury. 2 Thompson on Trials (2 Ed.), sec. 1541. (5) A material misrepresentation of fact by which a party is induced to enter into a contract which works an injury is ground for a rescission even though no fraud accompany the statement. Yeater v. Hines, 24 Mo. App. 619; McLennon v. Seibel, 135 Mo. App. 26. (6) When waiver is relied upon it must be pleaded. Keeny v. McVoy, 206 Mo. 42.

Howard Ragsdale and *Patterson & Patterson* for respondent.

(1) The $300 item mentioned in the contract should be taken and considered as liquidated damages. Where the parties to a contract, in which the damages to be ascertained growing out of it are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, in language plainly expressive of such agreement and when the intention is plain and palpable, there is no law to justify the courts in giving the contract a different construction. Lawson on Contracts, p. 510; Morse v. Rathbun, 42 Mo. 594; Hamaker v. Schoers, 49 Mo. 406. (2) Defendant seeks to avoid liability for the breach of his contract upon the ground that plaintiff represented to him that the stock of merchandise in question would not invoice more than approximately $7000. This at most was a mere expression of opinion on the part of plaintiff and a representation as to a future event, and, therefore, constitutes no defense to plaintiff's action. 1 Jaggard on Torts, p. 577; Estes v. Shoe Co., 155 Mo. 577. (3) Defendant admits that he was

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informed by plaintiff that the stock of merchandise would probably invoice about $8500 before he had plaintiff to close his store for the purpose of taking the invoice. This amounted to a ratification of the contract after the discovery of the alleged fraud and defendant cannot be heard to complain that the contract was induced by fraud. Hart v. Handlin, 43 Mo. 175; Estes v. Reynolds, 75 Mo. 565; Taylor v. Short, 107 Mo. 384; Robinson v. Siple, 129 Mo. 222.

STATEMENT.—The plaintiff brought this action for damages alleging defendant's failure to comply with the terms of his written contract to purchase a stock of goods, and prayed for judgment in the sum of three hundred dollars, the amount specified in the contract as liquidated damages for failure to perform. The defendant in his answer admitted the execution of the contract and his failure to comply, but denied that plaintiff was damaged in any way. He also set up as a defense that he was induced to sign said contract on the strength of certain representations made to him by the plaintiff in regard to the amount the stock of goods would invoice; that he told plaintiff he would not execute the contract if the goods exceeded approximately $7000; that plaintiff assured defendant that he knew approximately the value of the stock and falsely represented that it would not be more than $200 in excess of $7000; that at the time plaintiff made such representation he knew that the stock would amount to about $9000; and that, relying on such representation defendant was induced to enter into the contract; that the goods on invoice actually amounted to $8975, and that the peculiar terms of the contract made it hazardous for defendant to trade for a stock greater in value that $7000 in round numbers. The plaintiff's reply was a general denial.

After all the defendant's evidence had been introduced, and after plaintiff's evidence in rebuttal and

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defendant's rejoinder thereto, the court gave an instruction directing the jury to return a verdict for the plaintiff assessing the damages at $300. Judgment was rendered accordingly, and after unsuccessful motions for a new trial, and in arrest of judgment, defendant perfected an appeal to this court.

The evidence shows that the defendant, a resident and merchant of Springfield, Missouri, having been engaged in the merchandise business for about twelve years, owned an equity in some real estate in Springfield; that through a real estate broker, one Nash, he met the plaintiff, a resident and merchant of Ash Grove, Missouri, and that defendant and Nash went to Ash Grove for the purpose of examining plaintiff's stock of goods. The defendant was in plaintiff's store from in the morning until after supper, and according to his testimony the plaintiff explained the costmark on specific articles but did not give it to him in writing, his testimony being that his investigation went more to the quality than the quantity of the stock of goods. After supper a trade was generally agreed upon, but no written contract was entered into until November 22, 1911, a few days later. The following provisions of the contract are all that are necessary to be set forth in order to determine the case:

"Upon the completion of said invoice of said goods, wares and merchandise, whatever said goods, wares and merchandise and fixtures and furniture, with the said two per cent added as aforesaid for carriage, shall total over and above the sum of $4500 shall be paid to the second party as follows: The first party agrees to and hereby obligates himself to turn over to the second party the daily sales of said stock each day, reserving therefrom only the reasonable running expenses of said business, and the first party agrees to permit the second party or some one by him, the second party, employed, to remain in said store for the purpose of inspecting the amount of such daily

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sales, and for that purpose shall have the right to examine the books of the said first party to ascertain the amount of such daily sales, and to receive such daily sales, less said running expenses, for which the said first party agrees to pay to such second party, or his agent, the sum of $1.50 per day.

"And it is further agreed and understood by and between the parties hereto that the whole of the difference between the total of the invoice price of said goods, wares and merchandise and furniture and fixtures of said second party, with the said two per cent added for carriage, and the sum of $4500, the equity of the said first party in said Springfield property conveyed by him to said second party, shall be paid in full to the second party by January 1, 1912. It is further agreed and understood by and between the parties hereto that said stock of goods and fixtures conveyed to the first party by the second party as aforesaid shall not be removed from their present location until paid for in full as afore described.

"It is further agreed and understood by and between the parties hereto that in event either party shall fail to do and perform the agreements and covenants herein contained shall forfeit and pay to the other party the sum of $300 liquidated damages sustained by such party.

"It is further agreed and understood by and between the parties hereto that in event the first party shall fail or refuse to make full payment of the amount due on said invoice between said invoice of said goods of second party and the $4500 paid by first party by January 1, 1912, then in that event the said stock of merchandise and fixtures thereto belonging conveyed hereby by second party to first party and all that may be added thereto by the first party shall revert to the second party and he shall be entitled lawfully to the possession thereof on demand.

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"It is further agreed and understood by and between the parties hereto that said invoice shall be commenced and continued until completed as soon as convenient and to begin November 27, 1911."

The plaintiff introduced the contract in evidence and proved the breach, offering no proof of his actual damages but relying upon the clause in the contract providing for liquidated damages. His evidence consisted of his own testimony, and that of his attorney, Mr. Ragsdale, and of his clerk, Mr. Collins. However, defendant admitted the execution of the contract and the breach, so that the plaintiff on his theory had made out a prima facie case.

In order to determine whether the trial court committed error in directing a verdict for the plaintiff, a careful review of the defendant's evidence is necessary.

The defendant testified that on the first day he was in the store and before any contract was entered into he had a conversation with plaintiff relative to the value of the stock of goods, as to what it would invoice, and that at first plaintiff said he didn't know exactly what it would be, but that in the afternoon of that day he told defendant the stock would go around $7000—might miss that a little either way; that plaintiff said he had the principal part of the invoice and that he kept a merchandise account and that the stock would go approximately $7000, and that that sum would not miss it either way more than $200, which statement, defendant says, was made by the plaintiff on two occasions that day; that when he asked plaintiff how much it would invoice, plaintiff told him he kept a merchandise book and that he knew approximately what it would be. Defendant further testified that plaintiff introduced him to his clerk, Mr. Collins, and informed him that Collins had been in the stock nineteen or twenty years and knew about as much about the stock of goods as did the plaintiff; that in

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answer to a question as to what the stock would invoice, Collins informed the defendant that it would go around $6500—maybe $6700. That defendant told plaintiff positively he would not consider anything above $7000, approximately. Defendant also testified that it was impossible for him to estimate the stock within from two to three thousand dollars. That he never formed any basis from his own knowledge or inspection of the goods what the invoice would amount to. That relying on what plaintiff and Collins had told him, they being familiar with the stock and having the invoices and the merchandise book, he believed the stock would run from $6700 to $7000, and that he relied upon these representations in making the contract. That when they were figuring on what the carriage would be, the plaintiff and defendant both figured that the three per cent on the amount of the invoice would run $210. That on or about the twenty-second day of November, about two days after defendant's visit to Ash Grove to see the stock, Mr. Nash brought the contract to him, signed by the plaintiff, and that he, the defendant, signed it and put it in his pocket and told Nash to tell the plaintiff he had signed it and would be there on the twenty-seventh to begin the invoice. That he went on the twenty-seventh, taking with him a man to help invoice, and taking also his deed and abstracts necessary to carry out his part of the trade, and that he found the plaintiff expecting him and ready to begin invoicing, having employed a man for that purpose. That before he went from the train to the store he went to the office of plaintiff's attorney, Mr. Ragsdale, and there signed the other copy of the contract.

The defendant also testified at length concerning what occurred in the store that morning after he had signed the other copy of the contract and before the invoice was begun. He stated that soon after he reached the store and before any thing was done, plain-

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tiff called him aside and said to him, among other things of the same character, "This deal has been started into on misrepresentations to you;" and that when he asked plaintiff why he had not told him this prior to his signing the contract, the plaintiff's answer was, "Mr. Nash told me not to tell you that;" that in discussing with plaintiff what Collins had said about the stock not running over $7000, plaintiff remarked. "I will bet Nash has had hold of the old man."

Other facts deemed essential to a determination of the case will be found stated in the opinion.

OPINION.

FARRINGTON, J.—The burden of proving fraud inducing the contract was of course on the defendant, the party asserting it, and when at the close of the evidence in the case the court gave a directed verdict for the plaintiff, it amounted to the sustaining of a demurrer to the defendant's evidence. It is as if the court had said: Looking to your evidence alone and admitting to be true everything you have said and giving every inference that can be deduced from your testimony a fair construction in your favor and giving your testimony every reasonable intendment in order to ascertain your right of defense claimed in your answer, still you have not shown a state of facts from which a reasonable inference can be deduced sufficient to uphold a verdict in your favor (Jackson v. Hardin, 83 Mo. 186; Powell v. Railroad, 76 Mo. 80; Reichenbach v. Ellerbe, 115 Mo. 588, 22 S. W. 573); no inference could be drawn from your testimony, considered in its most favorable aspect, by a reasonable man which would establish your defense of fraud inducing the contract; in other words, admitting the truth of all the evidence which has been given in your favor together with all such inferences and conclusions as

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can reasonably be drawn therefrom (Wainright v. Missouri L. & M. Co., 156 Mo. App. 512, 518, 137 S. W. 53), there is not enough competent evidence to sustain a verdict in your favor should the cause be submitted and the jury so find.

The rule has long been settled in this State that on a demurrer to the evidence, the court must indulge every inference of fact in favor of the party offering the evidence which a jury might indulge with any degree of propriety. [Wilson v. Board of Education, 63 Mo. 137; Heine v. Railroad, 144 Mo. App. l. c. 447, 129 S. W. 421.] And, as said in the case of Johnson v. Grayson, 230 Mo. l. c. 394, 130 S. W. 673, "Where there is in a law case evidence which, if true, would establish any one of the good defenses pleaded in the answer, the court should not give a peremptory instruction to find for plaintiff, but should submit the issue to the jury. [Jenks v. Glenn, 86 Mo. App. 329; Dunbar v. Fifield, 85 Mo. App. 484; Hahn v. Bradley, 92 Mo. App. 399; Hugumin v. Hinds, 97 Mo. App. 346.]" The soundness of the rules announced by our own courts is attested by similar decisions in other jurisdictions. Thus it is held that where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled. [Harris v. M., K. & T. Ry. Co., 24 L. R. A. (N. S.) 858; Cooper v. Flesner, 23 L. R. A. (N. S.) 1180.] And, as said in Edmisson v. Drumm-Flato Com. Co., 73 Pac. 958: "While there is some conflict in the testimony, the rule on demurrer is that the court cannot weigh conflicting evidence, but the court will in such cases treat the evidence which is most favorable to the party offering the demurrer as withdrawn. . . . A demurrer to the evidence ad-

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mits all the facts which the evidence in the slightest degree tends to prove, and all the inferences which may be logically and reasonably drawn from the evidence.'' When a party demurs to the evidence, no evidence introduced by him can be considered on the demurrer. [6 Ency. of Pl. and Pr. 445.] By demurring to his adversaries' evidence he waives his own. [38 Cyc. 1542; St. Clair v. Railway Co., 29 Mo. App. 76, 87.] This being true, this court must not search the defendant's testimony for inconsistencies that could be construed in plaintiff''s favor (6 Ency. of Pl. and Pr. 445), and must not look at all to the plaintiff's evidence to sustain the judgment.

That an issue of fact was raised as to whether the stock of goods had been represented to defendant as not amounting to over approximately $7000 is disclosed by the record, which shows that the plaintiff introduced evidence in rebuttal denying that statements attributed to him by the defendant were made and denying that conversations detailed by defendant ever took place; and if the representation which defendant swears was made was of a fact and was not a mere expression of opinion (which will receive attenton later), the determination of such question should have been left to the jury. The court must submit an issue of fact, no matter how clear the testimony may be. [Johnson County Sav. Bank v. Redfearn, 141 Mo. App. 386, 125 S. W. 224.] Where actual fraud is charged, the question is very largely one of motive and intent; and the question of fraud or no fraud will, therefore, in most cases, be a question for the jury. [2 Thompson on Trials (2 Ed.), sec. 1945.]

For the purpose of this appeal, it must be admitted—because it is sworn to by the defendant as a fact—that plaintiff told him that he (plaintiff) had the merchandise account and the invoices and that the stock would not miss $7000 on an invoice, $200 either below or above; and, that plaintiff's clerk, Mr. Collins

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(who was introduced to defendant by plaintiff as a man who was all right and who had been there in the store for nineteen or twenty years, and who knew almost as much about the stock as plaintiff himself, and who was directed to show defendant through the store and tell him anything he wished to know), told the defendant in answer to a question that the stock would not run over $6700. And defendant testified that relying on these representations he was induced to and did enter into the written contract.

As was held in the case of McBeth v. Craddock, 28 Mo. App. 380, where a party, by his statements and asseverations, purposely induces one to rely upon their truth, and forego other sources of information, he cannot escape liability by then suggesting further inquiry. It is a question of fraudulent intent and good motive, for the jury to determine.

If the statements sworn to by the defendant as having been made, were made, we believe he was justified in relying upon them for the reason that plaintiff had owned the stock of goods for a number of years and kept the invoices and merchandise account, which, as the invoice disclosed, did reveal substantially what the stock amounted to. Plaintiff's statements, coupled with those of his highly-recommended clerk, would lead any reasonably prudent man to believe that they knew what they were talking about when they made these assertions. As was said by LAMM, J., in the case of Judd v. Walker, 215 Mo. 312, 338, 114 S. W. 979: ". . . it ought not to be held that trust cannot be put in a positive assertion of a material fact, known to the speaker and unknown to the hearer, and intended to be relied on."

But respondent contends that even admitting there is a conflict in the evidence raised by the testimony of the defendant, such conflict was not a question of fact as to what the stock of goods would invoice but merely an expression of an opinion.

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In this, we cannot agree with the respondent. It will be noted that the stock of goods was not to be traded in bulk for the real estate of the defendant but was to be traded on the basis of taking an invoice to ascertain exactly what was in the stock and what would be the difference the defendant would have to pay the plaintiff over and above the value placed on said real estate—$4500. The case does not fall within the rule that a vendor has a right to "puff" his wares and rely on the principle of *caveat emptor,* because the parties had agreed on their trade and had fixed the value of the goods at the invoice price, plus carriage. The misrepresentation which the defendant contends was made was not a misrepresentation as to value but a misrepresentation as to the amount that the invoice would total. Indeed, in this case, we very seriously doubt that had it been a "lump sale" and had the plaintiff told the defendant his merchandise account and invoices showed that the stock would run $7000, and the fact developed afterward that the invoices and the merchandise account ran $2000 over $7000, such representation in that case would not be a "puffing" of the merchandise, but a representation of a material fact which did not exist. [Bower v. Fenn, 35 Am. Rep. 662; Cressler v. Rees, 20 Am. St. Rep. 691.] "On the other hand, however, statements as to the quality or quantity of real or personal property may be and often are statements of fact, and have frequently been held to constitute fraud. As a general rule, if they are made positively, as of his own knowledge, by one who is apparently in a position to know the truth, and are relied upon by the person to whom they are made, they are not to be treated as mere expressions of opinion." [14 Am. and Eng. Ency. Law, 44; Buford v. Caldwell, 3 Mo. 477; Glaspie v. Keator, 56 Fed. l. c. 210; Chase v. Broughton, 54 N. W. 44.] In Judge GOODE's opinion in the case of Lewis v. Muse, 130 Mo. App. l. c. 200, 201, 108 S. W. 1107, this language is

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used: "If defendant swore truly, he relied entirely on plaintiff's statement as to the number of acres of corn. He was unfamiliar with the acreage of the land and plaintiff was familiar with it as owner. Hence defendant cannot be charged with lack of ordinary prudence, nor can knowledge be imputed to him because by proper diligence, he would have obtained it. . . . In cases like this one the representation of quantity is treated as an implied warranty, for a breach of which damages are recoverable." In the case now under consideration, any "puffing" would go to the per cent on the dollar that the defendant would pay for the goods on invoice, and it appearing that he agreed to pay one hundred cents plus two per cent for carriage, the gross sum that the stock would run merely depended on adding the items taken at the value at which defendant agreed to pay for them determined from the cost mark on the goods. In other words, $7000 would not fix the value of the stock of goods because that was to be fixed by the invoice, which, according to defendant's theory, might run $200 over or $200 below $7000. His contention is that the plaintiff represented to him that the stock taken at the invoice price would not amount to over approximately $7000.

The testimony of the defendant is that he made no effort whatever to ascertain the amount the stock would run, but as to that relied on the representations, and that such examination as was made by him was as to whether the goods were marked correctly and as to their quality, and if his story is to be taken as true, this would be the reasonable course he would take on an investigation. It is also in evidence that in the space of time consumed by defendant in looking through the stock it would have been impossible for him to have determined within several thousand dollars what the stock would invoice. The goods, having been contracted for on invoice and not in bulk, we

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think, brings this case within the same rule that applies to a sale of land where there is a representation as to the number of acres, where it is bought by acreage, and where the total price to be paid for the tract is to depend upon the number of acres contained therein, and in such a case, where there is a statement made misrepresenting the number of acres, even though the purchaser goes upon the land and views it and even though he could have gone to the recorder's office and ascertained the true acreage, he has a right to rely on the statements made by the seller, and if they are false, he can recover. [Judd v. Walker, supra.]

The question as to whether the defendant in this case was deceived or not is one for the jury. "If there was evidence tending to show that the situation of the property was misrepresented, and that the defendant, in his purchase, acted upon those misrepresentations, and not upon his own judgment, the question of knowledge and intention on the part of the seller becomes a material one, and must be left to the jury; and if the court took the case from the jury because in its opinion such knowledge was not proved, it committed an error." [Owens v. Rector, 44 Mo. 389. See, also, Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145.]

Respondent also contends that even though the representation was of a material fact and not a mere expression of opinion, still the defendant's plea of fraud would avail him nothing for the reason that he waived any fraud practiced on him and ratified the contract after the discovery of the alleged fraud. There are two answers to this contention:

(1) At the time the defendant swears that plaintiff showed him the merchandise book, which disclosed that the stock would run over $8700, the contract had been signed three or four days by both parties and retained by the defendant, and the notice of the fraud

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did not come to him until after he had signed the other copy of the contract in Mr. Ragsdale's office at Ash Grove on the morning of November 27 when defendant went there to begin the invoice. At the time the notice of the fraud was imparted to defendant, the status of the parties was fixed under their contract, and according to plaintiff's position as told by the defendant, the defendant was then bound to pay him three hundred dollars if he failed to take the stock of goods and it should invoice approximately $7000, or if he should fail to take the stock of goods and it should invoice approximately $9000. If defendant's statements are to be taken as true—and on that the jury and not the court must pass—defendant had been led to believe by the plaintiff that the stock would not run over approximately $7000 at one time, which was prior to signing the contract, and at the later time he was led to believe by the plaintiff that the stock would run approximately $9000, which was after he had entered into the contract and his rights and duties had become fixed thereby. He could do nothing in order to protect himself, if his story be true, other than to ascertain what the stock would run, and the evidence shows that after the invoice was made they extended the items and added them within a reasonably short time and as soon as defendant ascertained that the stock actually invoiced the amount that it did, he refused to perform. It is true, he made several suggestions as to relieving the situation in some way which were not agreed to by the plaintiff, and this, if it shows anything, would merely indicate a desire on the part of the defendant to not back out of the trade entirely but try to consummate a deal along the lines he understood when the contract was entered into.

(2) As a further answer to this contention, the plaintiff is in no position to urge a waiver and ratification for the reason that the same was not pleaded in the reply (which was merely a general denial).

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[Keeney v. McVoy, 206 Mo. 42, 59, 103 S. W. 946; Cooper v. Flesner, 23 L. R. A. (N. S.) 1180.]

In viewing this entire question of the direction of the verdict for the plaintiff and the question of fraud raised in this record, it might not be amiss in passing to judgment to say that in a given case, even though the evidence preponderates for one party or another, still if there is any substantial evidence amounting to more than a mere scintilla which does raise an issue of fact, the trial courts and the appellate courts must leave that issue to the determination of the tribunal appointed by law to weigh the evidence and judge the credibility of the witnesses. And it is with even greater caution that they should proceed where a verdict has been directed for the plaintiff, because, in cases where the trial court indicates that a peremptory instruction will be given for the defendant, the plaintiff may in the discretion of the trial judge adduce further evidence in support of his cause of action, or, after the peremptory instruction is given, take a nonsuit and thus be enabled to come again into court for the enforcement of his alleged rights; but the defendant has no option or election where the verdict is directed in favor of the plaintiff and against the defendant; he can only stand and deliver, and his only remedy is appeal.

In view of the fact that this case is to be subject to retrial in the circuit court, it will be necessary for us to pass upon the question raised by counsel in their briefs as to what the measure of damages is to be under this contract. Appellant contends that the $300 item mentioned in the contract should be construed as a penalty and not as liquidated damages. Whether or not a stipulation in a contract is for a penalty or for liquidated damages is a question of law and is not for the jury to pass upon. [May v. Crawford, 150 Mo. 504, 51 S. W. 693.] A stipulation to pay a fixed sum in a contract as damages to the aggrieved party will

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be construed by the courts as liquidated damages and so enforced, provided the sum fixed is not out of proportion to the presumable loss and does not amount to extortion or oppression [Menges v. Milton Piano Co., 96 Mo. App. 283, 70 S. W. 250; St. Louis, I. M. & S. Ry. Co. v. The Jefferson Stone Co., 90 Mo. App. 171.] It was held in the case of Sun Printing Co. v. Moore, 183 U. S. 642, 46 L. Ed. 366, that where the parties to a contract in which damages growing out of a breach are uncertain in amount mutually agree that a certain sum shall be paid in case of a failure to perform and in language plainly expressive of such agreement, it would be unsound for a court to say they intended something else.

In the case under consideration, the plaintiff's stock of goods amounted to approximately $9000, and was locked up for about five days during the inventory at a season of the year when trade is best. It would be difficult to compute just how much profit plaintiff actually lost, to say nothing of the customers he may have lost by reason of the closed doors and the implied advertisement of his going out of business. The sum of $300 is a very reasonable amount, and as the parties fixed it by contract, it should not be disturbed.

For the reasons herein appearing, the judgment is reversed and the cause remanded. *Robertson, J.*, concurs. *Sturgis, J.*, concurs, but expresses no opinion as to the $300 being a penalty of liquidated damages.

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J. THOMAS AND SON, Respondents, v. A. M. BROWN, Defendant, EVA J. BROWN, Interpleader, Appellant.

Springfield Court of Appeals, March 3, 1913.

ATTACHMENT: Grounds For: Evidence Insufficient. That the defendant had left the town in which he resided, saying that he would not return, and that it was not known by any of the witnesses where he was up to the time of the trial, is not sufficient evidence to support a finding that the defendant was not a resident of Missouri or that he was about to move out of the State, with the intent to change his domicile.

Appeal form Barry Circuit Court.—*Hon. Carr McNatt,* Judge.

REVERSED AND REMANDED.

Mayhew, Sater and *Gardner* for appellant.

1. Written demand of the officer is a sufficient notice of wife's selection. State ex rel. v. Wolfe, 81 Mo. 586; Wife has rights to the exemption under sections 2185 and 8304. 2. Wife may maintain action though she has joined her husband temporarily in another State. Griffith v. Bailey, 79 Mo. 472. 3. Where the material facts are undisputed the appellate court must review their legal effect and decide whether the judgment is warranted by such undisputed facts. Knapp, Stout & Co. v. Stanley, 48 Mo. App. 264; Bruin v. Fair Assn., 40 Mo. App. 425; Waddell v. Williams, 50 Mo. 216; Henry v. Bliss, 75 Mo. 194; Douglas v. Orr, 58 Mo. 573; Moore v. Hutchinson, 69 Mo. 429; Robbins v. Phillips, 68 Mo. 100; Hart v. Leavenworth, 11 Mo. 629. 4. Did the wife go to Texas with the intention of abandoning her residence in Monett; or if she left with no such intention, did she afterwards conceive it? If neither of these purposes were resolved upon, she con-

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tinued to be a resident of Monett. All the testimony shows that she was coming back to Monett on the 4th of July, 1911. State ex rel. v. Dayton, 77 Mo. 678; State ex rel. v. Banta, 71 Mo. App. 32, 41. 5. The wife only claims for the husband when he has abandoned and absented himself from his usual place of abode so that the ordinary process of law cannot be served on him. Steele v. Leonori, 28 Mo. App. 681. 6. When property has been claimed as exempt by the wife under Sec. 2185, R. S. 1909, the fact that the affidavit for attachment in addition to stating defendant had absconded and absented himself from his usual place of abode, alleged he was about to move his property and effects out of this State with intent to change his domicile, and also that defendant is a nonresident of this State, was not proof of that fact. Martin v. Barnett, 158 Mo. App. 375; Griffith v. Bailey, 79 Mo. 472; Lindsey v. Dixon, 52 Mo. App. 291. 7. One can abscond or absent himself from his place of abode without becoming a nonresident of the State. The former is not necessarily a resulting consequence of the latter. Martin v. Barnett, 158 Mo. App. 375.

Sizer and *Kemp* for respondents.

1. In an action at law, tried by the court by consent, without the aid of a jury, where no instructions are asked or given, as in this case, the finding of facts made by the judge is conclusive upon the parties in this court. Keen v. Keen, 184 Mo. 358; Chapin v. Stahlhuth, 102 Mo. App. 299; Russell v. Jones, 181 Mo. 699. 2. When the trial is before the court, without a jury, the appellate court should defer to the latter's finding, since the trial court passes upon the credibility and weight of the evidence. Carlos v. Railroad, 106 Mo. App. 574; Baumhoff v. Railroad, 171 Mo. 120; Martin v. Williams & Spicer, 96 Mo. App. 249; Mathewson v. Kilburn, 183 Mo. 110; Fuhlhage v. Nagle, 105 Mo. App. 471. 3. The object of Sec. 2185, R. S. 1909, was sim-

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ply to empower the wife, when the husband "has absconded or absented himself from his usual place of abode in this State" to make such claims for exemptions as the husband, if present, might make. Her rights are no greater than his, were he present asserting the same. She is, in fact, his vice, his representative, in that consideration of things. Steele v. Leonard, 28 Mo. App. 675-684. 4. The meaning of the words "about to remove" in the attachment law of this State is substantially this: "If a purpose exists to remove and the scheme may be carried out in one, two, three or several months, and if contemplated with a view to evade or delay creditors, the writ may be taken out." Elliott v. Keith, 32 Mo. App. 579.

STATEMENT.—This action was commenced in a justice's court, where the plaintiffs prevailed. On appeal to the circuit court of Barry county, judgment again went for the plaintiffs, and the case is here on the appeal of Eva J. Brown, an unsuccessful interpleader.

An attachment suit was brought by the plaintiffs against A. M. Brown, the husband of the interpleader. The amount involved was a balance of ten dollars alleged to be due on account for a gocart bought by the interpleader in January, 1911, from the plaintiffs and charged to the defendant, the husband of the interpleader.

In May, 1911, plaintiffs caused a writ of attachment to issue out of a justice's court, the affidavit therefor stating as the grounds for attachment that plaintiffs have good reason to believe. and do believe, that defendant, A. M. Brown, is about to remove his property and effects out of this State with the intent to change his domicile; that defendant has absconded or absented himself from his usual place of abode in this State so that the ordinary process of law cannot be served upon him; that defendant is a nonresident of this State.

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The constable levied on some household goods and wearing apparel belonging to the defendant of less than the value of three hundred dollars. While the attachment suit was pending, Eva J. Brown, wife of the defendant, filed the following interplea (formal parts omitted):

"Comes now Eva J. Brown, interpleader in the above cause, and states that on the ——— day of May, 1911, by virtue of a writ of attachment issued before that time in said cause by said D. Wilkerson, justice of the peace of Monett township, the constable of said township in favor of said plaintiffs, J. Thomas & Son, of Monett, Mo., did levy upon and seize as the property of the said A. M. Brown, the following described property, to-wit: One chiffonier, one dresser, one sewing machine, two boxes household goods, three barrels household goods, one steel couch, one cot, one bale mattress, one rocking chair, six dining room chairs, one child's chair, one child's rocker, one stand table, one roll rugs, one carpet, two oil cans, and one ironing board.

"That the said defendant at this time has absented himself from his usual place of abode in Barry county, Missouri, and is absent therefrom, and has absconded and left his wife and two children, and was then and still is the husband of this interpleader, and is still absent from his usual place of abode, aforesaid, and that as the wife of said defendant, under and in pursuance to sections 2180 and 2185, Revised Statutes of Missouri of 1909, this interpleader selects, claims and demands and holds all the above described property exempt from said attachment; that in violation of the provision of said sections of said statute and section 2184 of said statutes, said constable, by virtue of said writ in said cause, has levied upon and seized said property and is withholding the same from this interpleader thereunder, and although duly notified of her selection of the same and demand to have same set over

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to her by virtue of said sections of said statute, that no exemption whatever has been allowed her by said constable; that no other property belonged to the defendant from which such exemptions can be obtained, and that the property aforesaid does not exceed in value the amount absolutely allowed her by said sections as such wife of defendant in his absence from his place of abode.

"Wherefore, interpleader asks that an order and judgment be entered for the recovery of the said property exempted to her."

The judgment complained of is as follows (formal parts omitted):

"Now on this day this cause on the issues joined between Mrs. Eva J. Brown, the interpleader, together with her attorney, D. S. Mayhew, and comes the plaintiffs, together with their attorney, F. P. Sizer, and both sides announcing ready, and a jury having been waived by both the plaintiffs and the interpleader, the issues were submitted to the court for trial sitting as a jury. Whereupon the interpleader offered all her evidence tending to support her claims and exemptions for the property attached, and the plaintiffs having submitted all their evidence against the claims of the interpleader, and the court, after hearing all the evidence adduced by both sides, and after hearing the argument of the respective counsel, and after being fully advised in the premises, doth find the issues for the plaintiffs; and further finds that at the time of the serving of the attachment herein, the defendant, A. M. Brown, was a nonresident of this State, or was about to move out of the State with the intent to change his domicile.

"It is therefore ordered and adjudged by the court that the said Mrs. Eva J. Brown take nothing upon her interplea and that plaintiffs be permitted to proceed with their attachment to final judgment.

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"It is further ordered and decreed that the plaintiffs recover of and from the interpleader and D. S. Mayhew, her bondsman on the appeal bond, their costs in this behalf, taxed at $49.45, for all of which execution shall issue."

The testimony of the interpleader shows that she was the wife of the defendant, A. M. Brown, and that her husband left the town of Monett, which was their home, on January 15, 1911, and that she did not know where he went and had not known his whereabouts since his departure; that after he left, she with her two minor childen stayed for probably two weeks in the rented house where they had lived, at which time she stored the household goods now in controversy and went to live with a neighbor for about two weeks. She then went to Greene county in this State to visit her father and mother, and on the tenth day of March, 1911, having returned to Monett, she left that place, taking her children and the gocart and went to Texas, for the purpose, as she says in her testimony, of "staying with her mother-in-law and working." She testified that it was not her intention to move to and become a citizen of the State of Texas. Her testimony is that she told one of the plaintiffs before leaving Monett that she would pay him for the gocart when she returned which would be on the fourth day of July. One of the plaintiffs as a witness denied that she made this statement. She testified that she stayed with her mother-in-law in Texas until she heard about the attachment suit and then came back to Monett on money which she had worked for, and that she had since resided in Monett, taking in washing and making a living in that way for herself and minor children. She stated as a witness that the goods attached belonged to her husband and that he had no other property, and that the goods were stored near the railroad tracks in Monett.

There is no competent testimony disclosed by the record showing the whereabouts of the defendant A.

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M. Brown, whether within or outside the State; nor is it shown by any evidence that he was about to leave the State with the intent to change his domicile, or that he was a nonresident of this State.

OPINION.

FARRINGTON, J.—There were no declarations of law asked or given by the court from which to ascertain the theory on which the case was decided. Where the trial court, sitting as a jury, makes a finding and renders a judgment in a cause originating in a justice's court where there are no written pleadings to show the theory on which the parties presented the case, and in the absence of any declarations of law to mark out the theory on which the circuit court rendered its judgment, such a finding and judgment must not be disturbed if from an examination of the record the appellate court finds any substantial evidence tending to show any reasonable theory on which the judgment may stand. [Freeman v. Foreman, 141 Mo. App. 359, 125 S. W. 524.] This court must assume that the trial court committed no error, and in the absence of pleadings and declarations of law, if there is any substantial evidence on which the judgment may stand, we must assume that the trial court believed that evidence and made its finding and rendered its judgment upon that theory. [Bowser v. Atkinson, 161 Mo. App. 450, 143 S. W. 75; Neil v. Cunningham Store Co., 149 Mo. App. 53, 130 S. W. 503; Whitener v. Scoggins, 152 Mo. App. 343, 133 S. W. 90.]

The record before us presents but one theory upon which this judgment could have been rendered, namely, that the defendant Brown, husband of the interpleader, was a nonresident of the State, or that he was about to remove his property and effects out of the State with intent to change his domicile, and that

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therefore his wife cannot claim under section 2185, Revised Statute 1909.

The trial court made a finding—incorporated in the judgment—which shows, as contended by the parties here, that the theory on which the judgment was rendered was that Brown was a nonresident or was about to move out of the State with the intent to change his domicile, and both parties treated such finding as decisive of the case; therefore, if there was any substantial evidence to support that finding, then under the rule stated by the Kansas City Court of Appeals in the case of State ex rel. Fowler v. Chaney, 36 Mo. App. 513, and again in the case of Lindsey v. Dixon, 52 Mo. App. 291, the judgment would stand. The judgment, being based on this theory, is erroneous because there is no evidence to support it; nowhere in the record do we find any competent evidence that Brown was a nonresident of Missouri or that he was about to move out of the State with the intent to change his domicile. The most the evidence discloses is that Brown left his home in Monett saying he would not return and that his whereabouts up to the time of the trial was not known to any of the witnesses who testified. It is true, witness Nelson testified that he received an inquiry from the M. K. & T. Railway Company concerning Brown and that the letter was addressed from some point in Texas, but that was no evidence that Brown was then, or ever had been, in Texas or that he was about to change his domicile out of Missouri. Hence the judgment, under the cases last referred to, is wholly unsupported by the evidence.

In this connection we desire to state that while it is not decisive of the question in this case, as hereinbefore shown, we are not favorably impressed with the rule laid down in the cases last cited, and believe that the better rule to be adhered to is that announced by the St. Louis Court of Appeals in the case of Martin v. Barnett, 158 Mo. App. 375, 138 S. W. 538, which

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we understand would allow the wife to claim under the statute where the husband has absconded or absented himself from his usual place of abode even though in doing so he may have left the State; but, as the question in this case is determined on the lack of any evidence to sustain the judgment, and as the appellate court must review the case on the same theory on which it was tried below and submitted here, it is unnecessary for us to certify the cause to the Supreme Court by reason of our disapproval of the rule declared by the Kansas City Court Appeals in the cases mentioned. The judgment is reversed and the cause remanded. All concur.

W. H. MUEHLING, Appellant, v. JOHN H. MAGEE, Respondent.

Springfield Court of Appeals, March 3, 1913.

1. **REAL ESTATE: Deed Without Reservation: Passes Title to Fixtures to Grantee.** A deed to realty which does not reserve fixtures thereon located, passes title to same to grantee.

2. **———: ———: Not Permitted to Vary Orally.** The grantor is not permitted to set up an oral agreement under which he would claim that it was not the intention of the parties to the deed that the fixtures were to pass. This would be varying the terms of the deed.

3. **FIXTURES: What Are: Intention of Parties.** In determining what is a fixture, the intention of the parties is to be considered rather than a mere physical attachment to the realty. Houses, machinery etc., may be placed on land in a permanent manner and yet remain personalty as between the parties to the transaction and those claiming under them with notice, if the parties by agreement evidence the intention that such shall not become part of the realty.

4. **———: Grantee's Knowledge as to Ownership: Injunction.** A suit by the grantee cannot be maintained to enjoin the removal of a boiler from the premises, when the grantee knew, prior to his purchase of the property, that his grantor did not own the boiler.

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5. ———: **Severance: Deed Not Necessary.** A deed of severance is not necessary in order to sever a fixture, such as machinery, from the real estate and make the same personalty.

6. **GRANTOR AND GRANTEE: Rights of.** A grantee with notice has no greater rights than his grantor had.

Appeal from Jasper County Circuit Court, Division Number Two.—*Hon. David E. Blair,* Judge.

AFFIRMED.

J. D. Harris for appellant.

(1) Parol evidence is not admissible to construe, vary or contradict the terms of a deed. And where the owner of the land annexes a fixture to the freehold, it becomes a part of the realty; and unless the fixture is reserved in the deed, it will pass to his grantee as a part of the realty. Heitkamp v. Granite Co., 59 Mo. App. 251; State Security Bank v. Hoskins, 130 Iowa 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376; Todd v. Monsees, 160 Mo. App. 310. (2) A parol sale or reservation of a fixture annexed to the realty falls within the statute of frauds and is void. And to be valid the sale or reservation must be with the formalities prescribed for the sale of real estate. 19 Cyc. 1072; Potter v. Everett, 40 Mo. App. 160; Lead Co. v. White, 106 Mo. App. 230, 19 Cyc. 1070. (3) Even where the parties intend to reserve a fixture from the operation of the deed, yet if such intention is only expressed by parol contract, the fixture will pass under the deed as a part of the realty. Reservation of a fixture must be made in the deed conveying the real estate. Heitkamp v. Granite Co., 59 Mo. App. 244, 251; State Security Bank v. Hoskins, 8 L. R. A. (N. S.) 376; Todd v. Monsees, 160 Mo. App. 310. (4) An annexed fixture remains real estate, until an instrument in writing, sufficient in form, is signed, sealed and delivered, conveying it to some person other than the

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owner of the land. Severance cannot be accomplished by parol. Todd v. Monsees, 160 Mo. App. 310; Lead Co. v. White, 106 Mo. App. 230; Potter v. Everett, 40 Mo. App. 161; 19 Cyc. 1070; Madigan v. McCarthy, 108 Mass. 376; 11 Am. Rep. 371. (5) The doctrine of notice to the grantee cannot apply as between vendor and vendee, or mortgagor and mortgagee. It is self-evident that what may not be done by parol agreement cannot be done by mere notice. Todd v. Monsees, 160 Mo. App. 310; State Security Bank v. Hoskins, 8 L. R. A. (N. S.) 376; Heitkamp v. Granite Co., 59 Mo. App. 244; 19 Cyc. 1072.

McReynolds & Halliburton for respondent.

(1) Severance of fixtures is a matter of contract and the agreement between the parties supersedes the law and will be enforced by the court. 1 Kerr, Real Property, sec. 144; 1 Tiffany, Real Property, par. 235; Priestley v. Johnson, 67 Mo. 632; Hines v. Ament, 43 Mo. 296; Mason v. Calhoun, 44 Mo. 368; Lowenburg v. Bernd, 47 Mo. 297; Goodman v. Railroad, 45 Mo. 93; Neiswanger v. Squier, 73 Mo. 193; Brown v. Baldwin, 121 Mo. 127; Brown v. Turner, 113 Mo. 27; State v. St. Louis, 169 Mo. 31; Esther v. Burke, 139 Mo. App. 267; Gregg v. Railroad, 48 Mo. App. 494; Iron Works v. Hitt, 49 Mo. App. 472. (2) Counsel for plaintiff contends that evidence of the contract of severance in this case is inadmissible, because it disputes plaintiff's deed. Such is not the case. The severance in this case was a matter of agreement between Magee, the Bank of Carthage, and Carpenter & Shaffer Manufacturing Company; it was recognized by all the interested parties and became effective before Muehling bought the premises. It is quite as competent to show this situation as to show a contract of severance as between landlord and tenant or licensor and licensee. The grantee acquires only such estate and

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interest as the grantor possessed. 13 Cyc., pp. 657 and 527; Foote v. Sanders, 72 Mo. 616; Lewis v. West, 23 Mo. App. 509. (3) A contract of severance of a fixture may be by parol as well as by writing. The only object of a writing is to give notice. Pile v. Holloway, 129 Mo. App. 595; Lacey v. Giboney, 36 Mo. 324; Hunt v. Mullanphy, 1 Mo. 508; Burk v. Baxter, 3 Mo. 207; Elliott v. Wright, 30 Mo. App. 217; Loan v. Gregg, 55 Mo. App. 581; Baldwin v. Merrick, 1 Mo. App. 281. (4) The statute of frauds may be waived. 20 Cyc. 303; Brown, Statute of Frauds, pars. 135, 429; Farrar v. Patton, 20 Mo. 81; Aultman v. Booth, 95 Mo. 383; McGowan v. West, 7 Mo. 569; Railroad v. Clark, 121 Mo. 169; Hefferman v. Howell, 90 Mo. 344; Imboden v. Ins. Co., 31 Mo. App. 321. (5) By admitting all plaintiff's contentions, is he in a position to make this claim? The evidence shows that he had full knowledge of defendant's rights. He paid nothing for this boiler and he made no objection and allowed defendant to rest easy in the belief that plaintiff fully recognized and agreed to defendant's rights. Under these circumstances would not the court be assisting in the perpretation of a fraud in allowing plaintiff's claim? This is a court of equity, and plaintiff must come with clean hands and a fair and equitable case. 1 Pomeroy, Eq. Jur., par. 397-304; 16 Cyc. 144; Wilson v. Railroad, 120 Mo. 45; Joyce v. Growney, 154 Mo. 253; Seibel v. Higham, 216 Mo. 121.

STATEMENT.—This is a suit by injunction instituted in the circuit court of Jasper county on June 24, 1911, the object being to enjoin the respondent from removing a steam boiler from the mill of the appellant located in the city of Carthage. The property in question is known as the "canning factory," and consists of several lots and a brick factory building located thereon. The boiler in question stood in a portion of this building, and there is no doubt that it was firmly

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imbedded in solid masonry and used by the owner when put in as a part of the realty and thus became a part thereof; and that to remove the boiler, it would be necessary to tear down a part of the brick wall in order to get it out of the building. The boiler was placed in its present location about the year 1889 and was used to run a canning factory. After numerous conveyances, the title to the property became vested in the Bank of Carthage on the twenty-third day of April, 1897, and in 1907 the Bank of Carthage conveyed the property to the Carpenter & Shaffer Manufacturing Company, a corporation organized for the purpose of handling produce. On the tenth day of January, 1911, the Carpenter & Shaffer Manufacturing Company conveyed the property by general warranty deed to the plaintiff, W. H. Muehling. There never was a physical severance made of the boiler. In none of the conveyances does any reservation of the boiler appear.

It is admitted that the defendant, Magee, was threatening to remove and would have removed the boiler from the premises had he not been restrained by this action.

The answer of the defendant was a general denial, together with a claim of the ownership of the boiler and right of possession thereof by virtue of an oral agreement which was made between the Bank of Carthage, and the Carpenter & Shaffer Manufacturing Company, and himself, when the manufacturing company became the owner of the property, which oral agreement was alleged to be well known to the plaintiff before he purchased the property and before he received his unconditional deed therefor.

The defendant objected to the introduction of any oral testimony with reference to the understanding had between the parties owning the property prior to his deed for the following reasons: (1) Because, there being no reservation in the deed, and the boiler having

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once become a part of the realty, brought it within the Statute of Frauds, which would require a deed or an actual removal to work a severance. (2) Because his deed being absolute on its face, no testimony should be admitted which would vary its terms.

The preponderance of the testimony objected to by the defendant shows that the manufacturing company never claimed to own the boiler; that it was understood between that company and the Bank of Carthage and Magee, that they were buying all the lots and the building, but not the machinery which was in the building, including this boiler, and that most of the machinery was removed after the manufacturing company took possession, but that the boiler had remained there with the understanding that it did not belong to them; and that before they sold to the plaintiff they told him of this understanding with reference to the boiler and told him they did not own it and were not selling it to him.

This testimony was denied by the plaintiff, but the issues were found in favor of the defendant by the chancellor, which finding is in our opinion supported by the greater weight of the evidence, and is therefore correct.

The question to be decided here, is: May a grantee in a deed maintain a suit in equity to enjoin the removal of a boiler from the premises conveyed in his deed, when he knew that his grantor did not own the boiler and that it belonged to some one else, and when that information was known by him prior to his purchase and deed? And, in this connection, whether oral testimony against his claim to the boiler is inadmissible merely because his deed contained no reservation.

The trial court, over plaintiff's objection, admitted such testimony and found the issues in favor of the defendant, dismissing plaintiff's bill, and authorizing the defendant to remove the boiler conditioned on

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a bond given to restore the walls of plaintiff's building in the condition they were prior to its removal.

OPINION.

FARRINGTON, J. (after stating the facts).—The rulings with reference to fixtures in this as well as other states cannot be entirely harmonized; but the general tendency of the decisions, in determining what is or is to become a fixture, is to look more to the intention of the parties than to physical attachment to the realty. Hence the cases are numerous that a house, machinery, etc., may be placed on land in a permanent manner, but if the parties by agreement show an intention that such shall not become a part of the realty it will not so attach and will remain personalty as between such parties and those claiming under them with notice. [Hines v. Ament, 43 Mo. 298; Neiswanger v. Squier, 73 Mo. 192 (in the latter case, the terms of the lease allowing removal were extended by oral agreement); Esther v. Burke, 139 Mo. App. 267, 123 S. W. 72.]

The appellant practically concedes that when the boiler was placed on the land, had there been an agreement that it remain personalty with notice of such agreement, he by his deed would acquire no title to it, but contends that because it once became a part of the realty, then in the absence of a removal, no severance could take place by an oral agreement to that effect between the parties dealing with the property.

An examination of the authorities in this State discloses no case holding that a deed of severance is necessary in order to sever a fixture from the land and make it personalty.

Appellant's cases holding that a deed must be made to sever growing timber we do not think are applicable here. The very nature of growing timber makes it a part of the realty; intention of the parties

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dealing with it cannot make it a chattel so long as it stands; it only becomes personalty by a physical severance. But this is not the case with machinery, which may or may not be a part of the realty according to the intention of the parties. No reason is given nor distinction made between a case where a landowner may say to another, "You may put the boiler on the property and it will not become realty and is therefore out of the Statute of Frauds," and a case where the boiler is already on the land and they then agree that it shall not be treated as realty but as personalty. The same agreement that would prevent it from becoming realty when attached permanently to the soil ought and does, as between the two parties and those having notice dealing with the property, sever it from the realty.

It has been said that emblements no longer need pass by a deed, which is a concession to agricultural industry. [Mine LaMotte L. & S. Co. v. White, 106 Mo. App. 222, 235, 80 S. W. 356.] We think the same concession can be made as to machinery where the manifest intention of the parties is that it shall be treated as personalty, either before or after it is attached.

The case of Heitkamp v. The LaMotte Granite Co., 59 Mo. App. 244, 251, differs from this one in that the deed of trust was given on the real estate and the manchinery which was at that time a fixture, all owned by the grantor, while here the severance, though verbal, occurred prior not only to plaintiff's deed, but prior also to the deed of his grantor, the Carpenter & Shaffer Manufacturing Company, and plaintiff, according to the finding of the court, had knowledge that his grantor did not own the boiler. In the Heitkamp case there was no claim that the grantor did not own the fixtures when the deed of trust was made under which the fixtures were held.

The case of Brown v. Baldwin, 121 Mo. 126, 135, 25 S. W. 863, holds that the machinery placed on the land

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was treated by the parties not as a part of the realty, although it was a part of a factory which had been erected on the land, and was therefore not a fixture.

In the case under consideration, there is no doubt that the Carpenter & Shaffer Manufacturing Company, and the Bank of Carthage, and Magee, treated the boiler as distinct from the realty. The manufacturing company, admitting that it did not buy and was not the owner of this boiler, would certainly be precluded from maintaining such an action, and as was held in Sword v. Low, 13 N. E. 826, 833, a grantee with notice has no greater rights than his grantor had.

It was held in the case of Hawkins v. Hersey, 30 Atl. (Me.) 14, that when machinery is sold and placed in a building for the purpose of making it available as a manufactory, but under an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, it may properly be deemed personal property, as against a mortgagee, who, with full knowledge, consents to the arrangement, and may be removed by the seller retaining title thereto, although it has the character of a fixture, and has been permanently annexed.

In the case of State Security Bank v. Hoskins, 106 N. W. (Iowa) 764, 8 L. R. A. (N. S. 376) cited by appellant, while the grantee did have notice that certain personalty, including machinery which was on the farm, did not pass by his deed, still the court specially finds that there was no notice that the engine had passed under the bill of sale made prior to his deed, and on the ground that the engine had become realty and was not personalty it was held that it would pass with a deed to the realty; and the court in discussing the case recognizes the want of notice in the plaintiff that the engine was intended to pass under the bill of sale.

So in the case of Todd v. Monsees, 160 Mo. App. 310, 142 S. W. 743, the deed conveying the farm was

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made prior to the sale of the cider mill and without any notice to the grantee in the deed that the mill did not pass as a part of the realty.

The case of Potter v. Everett, 40 Mo. App. 152, relied on by appellant, involved the question of a sale of timber on land, and it is the law of this State that in order to pass title to growing timber it must be done by deed. Besides, the question of notice is not in that case.

In the case of Mine LaMotte L. & S. Co. v. White, 106 Mo. App. 222, 80 S. W. 356, we have the question of a severance of timber from the realty, and on page 234, Judge Goode in discussing the case uses the following language: "The instructions requested by plaintiff's counsel only asked a verdict for possession of the lumber manufactured after March 1, 1903, at which date, as is conceded, plaintiff acquired title to the property and the trees which were part of it, without notice of the defendant's claim. The court erred in refusing those instructions and adopting the theory that if the defendant was in possession and engaged in cutting timber on March 1, plaintiff could not recover. We know of no principle of law which sanctions that ruling." Thus it was held, inferentially, that merely being in possession, engaged in cutting timber, was not enough to give the plaintiff any notice of defendant's rights to the timber. Even in the case of growing timber, the lack of notice seems to be necessary for plaintiff to recover.

The correct principle we think is declared in the case of Durkee v. Powell, 77 N. Y. Supp. 368, where it was held that even if window shades and screens to a house were not personal property as a matter of law, the action of the parties dealing with the real estate by verbal agreement made them personal property, and that such agrement on their part severed the shades and screens from the realty and gave them the character of personalty, and a purchaser of the realty

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with knowledge of this understanding would not take the window shades and screens under a warranty deed where no reservation was made in the deed.

Under all the facts and the law applicable thereto, we do not believe the plaintiff has a case that will stand in a court of equity. It is our opinion that the judgment was for the right party, and finding no error in the record, it is affirmed. All concur.

ON MOTION FOR REHEARING.

PER CURIAM.—Counsel for appellant in their motion for rehearing evidently mistake the holding in our opinion. There is no question but that a deed to realty which does not reserve emblements or trade fixtures located thereon will pass title to the same to the grantee, and the grantor in the deed would be precluded from setting up an oral agreement under which he would claim that it was not intended by the parties that the emblements or trade fixtures were to pass, because this would be varying the terms of the deed. [Cantrell v. Crane, 161 Mo. App. 308, 143 S. W. 837.] What we hold is that either emblements or trade fixtures may be sold or severed or transferred by oral agreement and such sale, severance or transfer does not rquire the formality of a deed to pass good title. [Turner v. Morris, 142 Mo. App. 60, 125 S. W. 238.] In this case the severance of the boiler occurred long prior to the date of the deed under which the appellant claims, and he had notice of the severance when he accepted his deed and knew that he was not buying the boiler because his grantor told him that he (the grantor) did not own it. With the severance occurring long before his deed was executed and with this notice brought home to him, he is in no position to claim that which he knew his grantor did not own and therefore could not sell or transfer. When he was told by his grantor, prior to the acceptance of his deed, that the

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boiler did not belong to the grantor, a reasonably prudent man must have known from this statement that he was not buying it. The motion for rehearing is denied.

NICHOLS AND SHEPARD COMPANY, Appellant, v. M. N. BEYER, Respondent.

Springfield Court of Appeals, March 3, 1913.

1. **CONTRACTS: Forfeiture Stipulations: Construction of.** In construing forfeiture stipulations in a contract, the court is guided by the subject-matter and the intention of the parties and scrutinizes the terms and conditions with which the forfeiture stipulation is associated.

2. **———: To Compensate or Deter a Breach.** And the entire contract is examined and the surrounding circumstances of the particular case are considered, to determine whether the sum was inserted after an endeavor on the part of the contracting parties to fix the compensation in case of a breach or whether it was intended merely to deter a breach.

3. **———: Courts Favor Penalty Construction.** In ordinary contracts the aggrieved party should recover no more than the amount of loss that he has suffered, hence the courts favor construing forfeiture stipulations to be penalties rather than liquidated damages.

4. **———: Liquidated Damages.** But when damages are to be sustained by the breach of a single stipulation and these damages are uncerain in amount and not readily susceptible of proof under the rules of evidence, if the parties have agreed upon a sum as the measure of compensation for such breach and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages.

5. **———: ———: Must be Reasonable.** In a contract of sale involving $3200, where only eleven days elapsed between the time of the acceptance of the contract and its breach, where nothing appears to have been done to have changed the status of the parties or the property during that time, *held*, it would be unreasonable to presume that the plaintiff suffered a loss of $480 and such sum would be unreasonable. The amount was an arbitrary sum inserted in the contract for the purpose of deterring a breach of said contract rather than compensating for a single breach.

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Appeal from Newton County Circuit Court.—*Hon. Carr McNatt*, Judge.

AFFIRMED.

Hubbert & Hubbert for appellant.

(1) The contract in this case expressly established, by advance intentional stipulation, a permissible measure of damages for the optional abrogation of its other terms, and should not be construed as a mere penalty to compel performance. United States v. Bethleham Co., 205 U. S. 105, 51 L. Ed. 731; Keeble v. Keeble, 5 So. (Ala.) 149; 19 Am. & Eng. Ency. L. 418; Penie v. Weber, 47 Ill. 41; Ramlose v. Dohman, 100 Mo. App. 347; Machine Co. v. U. S., 45 Court of Claims Rep. 232; May v. Crawford, 150 Mo. 504. (2) The measure of damages specifically provided was well within the competence of the parties to the contract, which was free under the evidence, from any manifestation of fraud, compulsion, oppression or mistake, and therefore binding upon the parties; especially in view of the inherent uncertainties as to the actual damages which might accrue from breach. Sun. P. & P. Co. v. Moore, 183 U. S. 673, 46 L. Ed. 366; Krunkle v. Wherry, 42 Atl. (Pa.) 112; Calbeck v. Ford, 103 N. W. (Mich.) 516; Morse v. Rathburn, 42 Mo. 594. (3) Public policy concurs alike with the constitutional right of personal contract, and the stipulation of the contract accords with the fundamental equities, in requiring assessment of damages, according to the measure fixed thereby in advance. Guerin v. Stacey, 56 N. E. (Mass.) 892; In re Van Horn, 167 Fed. 1021; Madler v. Silverstone, 102 Pac. (Wash.) 165; Elston v. Roop, 32 So. (Ala.) 120; Long v. Furnas, 107 N. W. (Ia.) 432; Ahlers v. Harrison, 108 N. W. (Ia.) 331; Geiger v. Cawley, 109 N. W. (Mich.) 1064; Selby v. Matson, 114 N. W. (Ia.) 609; Howard v. Adkins, 78 N. E. (Ind.) 665; Werner v. Finley, 144 Mo.

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App. 554. (4) The errors of the circuit court are manifest, under a line of sound decisions in this and other jurisdictions, which we now cite as illustrations of the application of correct principles, to like cases of distinctively liquidated "damage" contracts, as contrasted with distinctively "penalty" contracts, viz.: Distinctively liquidated damage contract cases: Clement v. Cash, 21 N. Y. 253; Ahlers v. Harrison, 108 N. W. (Ia.) 331; Yoder v. Strong, 76 Atl. (Pa.) 176; Morse v. Rathburn, 52 Mo. 596, 602; Miller v. Smith, 67 S. W. (Tex.) 329; Machine Co. v. U. S., 43 Court of Claims Rep. 232; Womack v. Coleman, 93 N. W. (Minn.) 663; Moore v. Durman, 51 Atl. (N. J. Eq.) 449; Bank v. Burlington, 101 Pac. (Kan.) 649; Land Co. v. Maney, 48 Pac. (Wash.) 243; Calbeck v. Ford, 103 N. W. (Mich.) 516; Thompson v. Charles County, 227 Mo. 220. Distinctively penalty cases contrasted: Basye v. Ambrose, 28 Mo. 39; Parlin & Orndorff v. Boatman, 84 Mo. App. 67, 89 Mo. App. 43.

Horace Ruark for respondent.

(1) The contract in question will be held to be for a penalty and not liquidated damages, because the probable damages suffered by plaintiff can be easily ascertained by a jury under proper guiding instructions of the court, and the amount stipulated is largely in excess of the probable damages. Buchanan v. Exposition Co., 149 S. W. 27; Parlin & Orendorff v. Boatman, 84 Mo. App. 67, 89 Mo. App. 43; Hall v. Shoe Co., 150 Mo. 483; Connley v. Priest, 72 Mo. App. 673; Bayse v. Ambrose, 28 Mo. 41; May v. Crawford, 150 Mo. 504; Zimmerman v. Conrad, 74 S. W. 139 (not officially reported); Muehlbach v. Railroad, 148 S. W. 453; Tea Co. v. Walter Co., 148 S. W. 1109; Cochran v. Railroad, 113 Mo. 359; Tinkham v. Satori, 44 Mo. App. 659; Hannaker v. Schrorers, 49 Mo. 406; Machine Co. v. Frank, 117 N. W. (Neb.) 229; Machine Co. v. Souders,

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96 N. E. (Ind.) 177; Threshing Co. v. Diellian, 117 N. W. (Neb.) 231; Wagon Works v. Salmon, 68 S. E. (Ga.) 866; Implement Co. v. Tisser, 33 So. (Ala.) 818; 13 Cyc. 95; Sutherland on Damages, sec. 283; Merica v. Burgett, 75 N. E. (Ind.) 1083; Elmore v. Rugley, 107 S. W. (Tex.) 151; Squires v. Elwood, 49 N. W. 939; Clement v. River Co., 19 Atl. 274; Brennan v. Clark, 45 N. W. 472; Hathaway v. Lynn, 43 N .W. 956; Davis v. United States, 17 Court of Claims Rep. 201. (2) The burden does not lie upon respondent to show that the damages stipulated in the contract are unreasonable, but upon appellant to show that they are reasonable and that the contract provides a just measure of damages. For if the court is in doubt about the matter the doubt will be resolved in favor of holding the clause to be a penalty, and not liquidated damages. Parlin & Orendorff v. Boatman, 84 Mo. App. 75; Connelly v. Priest, 72 Mo. App. 673; Tinkham v. Satori, 44 Mo. App. 659; Potter v. McPherson, 61 Mo. 240; Gillilion v. Rollins, 41 Neb. 540, 59 N. W. 893; Merica v. Burgett, 75 N. E. 1083; Zimmerman v. Conrad, 74 S. W. 139; Construction Co. v. Hartman, 112 N. Y. S. 919, 61 Misc. Rep. 173; Elmore v. Rugley, 107 S. W. (Tex.) 151; Lee v. Normal School, 96 N. W. (Neb.) 65; Coen & Conway v. Birchard, 100 N. W. 48; Small v. Burke, 86 N. Y. S. 1066. (3) In case of doubt the court will resolve the provision to be a penalty rather than liquidated damages. Tinkham v. Satori, 44 Mo. App. 653; Thompson v. St. Charles County, 227 Mo. 230. (4) The contract will be held to be a penalty and not liquidated damages, because it calls for the same amount of damages for two different breaches, which would obviously cause different amounts of damages, viz.: For the cancellation, even if occurring the next day after signing, and for a refusal to accept after the goods had been prepared for shipment and actually shipped. Bayse v. Ambrose, 28 Mo. 39; Long v. Towel,

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42 Mo. 545; Boulware v. Crohn, 122 Mo. App. 571; Implement Co. v. Arms Co., 33 So. 818; Wagon Works v. Salmon, 68 S. E. 866; Morse v. Rothbaum, 42 Mo. 601.

STATEMENT.—This action was brought in the circuit court of Newton county on an order signed by the defendant (respondent) on March 9, 1912, which was accepted by the appellant four days later. It called for the purchase of a threshing machine outfit, to be delivered at Diamond, Missouri, on May 25, 1912, the price to be paid by defendant being $3200, and he was to turn over to appellant his old threshing outfit at an agreed price of $700, and execute notes for the balance, due at stated periods.

The entire contract, as set out in respondent's additional abstract, is a lengthy document, covering four pages of rather small type, all of the contract being in print except the numbers and description of the machinery bought and the time and terms of the payment. The contract was evidently drawn on a printed form with blanks left to be filled in covering the above particulars. It is headed in heavy type: "*Order for N. & S. Co's Machinery.*" The contract contains a great deal of matter that need not be set out here. But in order to convey an idea of its character, some of the items are here set forth:

"It is further hereby agreed that I will not hold Nichols & Shepard Company responsible for any agreement not expressed in this order . . ."

"It is expressly agreed that the vendor shall be liable only for the return of cash and notes payable to its order actually received by it and not for freight paid nor any machinery or other property taken herein as part payment."

"Failure to ship machinery at time ordered shall not involve damages, the vendor agreeing only to ship

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at its earliest convenience after date named when it has the goods in stock."

"Said purchaser further agrees that in case he refuses to accept said machinery at time and place above specified, or in case he cancel this order, he will pay to said Nichols & Shepard Company the freight on said machinery from factory to above-named place of delivery and freight for reshipping said machinery to the factory *and in addition thereto will pay fifteen* (15)*per cent of the above contract price which is hereby agreed shall be and constitute the liquidated damages for such breach of this contract.*" (The italics are ours.)

After the clause last quoted appears respondent's signature; then, either just under his name or on the margin, the following appears, written in ink: "Martin Beyer is to go to Kansas City and examine engine at the company's expense and if it is not as represented this order is no go and can be countermanded."

The petition sets out the general terms of the contract, the breach of respondent in cancelling, and alleges that by reason of such breach appellant was damaged in the sum of $480, the same being fifteen per cent of the purchase price.

The answer sets up fraud and misrepresentation on the part of the appellant, but admits the signing of the order.

The reply denies all new matter contained in the answer and alleges that respondent went to Kansas City on March 20, 1912, to inspect the engine, found it as represented, was tendered his expense money, and that he did not then and there countermand said order or declare it "no go."

Appellant introduced the contract, proved the breach, and showed that defendant examined the machine in Kansas City, little being said by him about the deal, and that at that time defendant made no objection to consummating the sale. Appellant, relying

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on the damages being stated or liquidated under the contract, according to its theory made a prima facie case by introducing the contract and showing the breach, which, as stated, was done.

At the close of plaintiff's evidence in chief, the only action taken by the defendant was to move the court to give the following instruction, which was done over the objection and exception of the plaintiff: "The court instructs the jury that under the law and the evidence the jury will find for the plaintiff for one dollar and no more."

Thereupon plaintiff took a nonsuit, but with leave of the court to move to set the same aside. The court then entered judgment against the plaintiff, and for the defendant, for costs. In regular course, the court overruled a duly filed motion to set aside the nonsuit and grant plaintiff a new trial, whereupon plaintiff perfected its appeal to this court.

It is contended on the one hand that the fifteen per cent clause found in the contract must be construed to provide for liquidated damages, and on the other that it is a penalty. If it is a penalty, the construction placed upon it by the trial court and its action thereon was correct as no damages were proved or offered for proof. If it is a provision for liquidated damages, the court erred in giving the instruction.

FARRINGTON, J. (after stating the facts).—As has been often said, the general rules by which the courts are to construe such agreements are well enough understood and defined, the difficuty lying in the application of the rules to particular cases, for there is frequently an apparent ingredient of both penalty and liquidated damages.

Ordinarily, the court must look to the subject-matter of the contract and the intention of the parties. [May v. Crawford, 150 Mo. 504, 51 S. W. 693.]

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The courts do and should favor construing forfeiture stipulations to be penalties rather than liquidated damages. [13 Cyc. 95.] This is because in ordinary contracts the aggrieved party should recover no more than the amount of loss he has suffered.

In the case of Wallis Iron Works v. Monmouth Park Ass'n, 19 L. R. A. (N. J.) 456, 26 Atl. 140, the court in holding a stipulation as providing for liquidated damages we think very aptly and tersely states the rule, as follows: "But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages."

Again, it is the duty of the court to examine the entire contract and the surrounding circumstances of the particular case, and from it all determine whether the sum stated was inserted after an endeavor on the part of the parties to the contract to fix the compensation in case of a breach, or whether it was intended merely to deter a breach.

In the light of these rules, let us view the contract in this case. To begin with, from the date of its acceptance until the date of the breach, only eleven days elapsed, as in appellant's letter of March 27, 1912, reference is made to a letter written by respondent on March 24, 1912, to appellant's agent refusing to consummate the deal. Nothing appears to have changed the status of the parties during that time; no work was done by the plaintiff on the machinery and no expense was incurred or anything of value parted with on the strength of the agreement. Indeed, all that appellant appears to have done was to tender the expense money to defendant covering the trip to Kansas City, and to write a letter accepting the terms of the order.

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Shall this court say that it may reasonably presume that plaintiff suffered a loss of $480? From all the facts and circumstances surrounding this case, such a sum is grossly out of proportion to the presumable loss.

Furthermore, do the facts disclose a case where the amount of damages is not readily susceptible of proof? This is the sale of a threshing outfit—a manufactured article of merchandise—a thing so common and now in such general use as to no longer strike wonder and terror to the small boy. It has a market value that is easy of ascertainment. The rule as to the measure of damages for a failure to carry out a sale of an ordinary article of merchandise (where not made for a particular use) is as well fixed as is the measure of damages in a case where a debtor fails to pay his creditor a certain sum of money. The same rule applies to the old outfit to be turned in on the purchase price at $700.

Yet another test is to view the entire contract. It is a lengthy printed order, except as to a few words and figures, designating the kinds and numbers of the machinery and the time and terms of payment, which are written in ink. It contains descriptions, warranties, stipulations guarding against representations made by agents, stipulations guarding against any damages growing out of the acts or failure to act by the company, and then the fifteen per cent damage clause. Thus viewing it as it is written, common sense tells us that the items most discussed and considered by the agent of appellant and the defendant were those concerning the inspection clause, the kind of machinery to be purchased, the kind to be traded in, and the manner of payment. The amount of the per cent of damages was not written in ink, but was printed; it was a part of the printed form. This leads one to believe that there was no endeavor to arrive at the probable damages and fix the sum in advance, but that the

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damage clause was an arbitrary sum inserted rather for the purpose of deterring than compensating a breach. Again, granting, as contended by appellant, that the damages might be much or little, does not the very fact of itself that they fixed it at a certain per cent of the purchase price preclude any attempt to arrive at an agreed probable loss? Viewing the clause standing alone, was it to compensate for a *single breach?* Certainly not. *First*: It must be fifteen per cent if the vendee refuses to accept the machinery at Diamond, Missouri, after the vendor has gone to the trouble of shipping—and that on the twenty-fifth day of May. *Second*: It must be fifteen per cent if the vendee cancel in the meantime, for example, on the twenty-fourth day of March, two months prior to the other happening and when there has been no change watever shown in the status of the parties or in the machinery.

True it is, they called it "liquidated damages," but their misnomer is no reason for this court to be led astray; the language is not conclusive. [13 Cyc. 91.] And certainly not in a case where the measure of damages is easily ascertainable, and where from the entire contract and from the particular item it appears to have been inserted as "scare money," and put in not to compensate but to deter a breach; nor in a case where the amount fixed is so out of proportion to the ordinary fluctuation in the market price of as staple an article as a threshing outfit—and that in a period of only two and one-half months.

Other courts have passed on stipulations almost identical in language to the one under consideration and have pronounced them penalties. [Parlin & Orendorff v. Boatman, 84 Mo. App. 67; J. I. Case Threshing Mach. Co. v. Fronk, 117 N. W. (Minn.) 229; J. I. Case Threshing Mach. Co. v. Souders, 96 N. E. (Ind.) 177; Florence Wagon Works v. Salmon, 68 S.

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E. (Ga.) 866; Mansur & Tebbetts Imp. Co. v. Tissier Co., 33 So. (Ala.) 318.]

As in determining the character of an individual we often look to the company he keeps, so in ascertaining the true character of a clause of a contract the courts will scrutinize the terms and conditions with which the particular clause is associated; and, to that end, there is set forth in the statement herein some of the clauses of the contract under consideration, indicating, on the whole, that they were drawn for the sole benefit and protection of the vendor—drawn on printed forms, ready at all times for the signature of any purchaser when the kind of machinery and the time and terms of payment had been agreed upon.

The cases cited by appelant where the stipulation was held to provide for liquidated damages are in perfact harmony with the views herein expressed as those cases arose out of contracts wherein the amount of damages was difficult to ascertain, or the amount was in reasonable proportion to the presumable loss and showed an honest endeavor to fix the sum to compensate rather than deter. Such authorities do not, therefore, persuade us to adopt appellant's contentions in this case, which, viewed from any angle, shows up a penalty. We must therefore hold that the trial court committed no error.

For the reasons herein appearing, the judgment is affirmed. All concur.

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JOHN P. PHIPPS, Plaintiff in Error, v. DAISY A. PHIPPS now DAISY A. CRAMER, Defendant in Error.

Kansas City, Court of Appeals, March 3, 1913.

1. **DIVORCE: Decree: Custody of Children: Right of Access.** The right of custody of children granted by a decree does not deprive the other party of the right to see the children unless there is an express provision to the contrary. And even the guilty party is allowed this privilege though in rare cases it has been refused where, on account of the depraved character of the party, it is deemed best.

2. ———: ———: **Modification.** A judgment for divorce, as regards alimony and custody and support of children, remains open for variation from time to time as the changed circumstances of the parties may require. But the custody cannot be changed except after notice and hearing and upon new facts or a change in the circumstances or character of the parties justifying a change.

3. ———: ———: **Slight Change Sufficient.** Where the application is in order that the mother may visit the child or have it visit her, the court, without deciding whether the order made is in reality a change of custody to the extent of the visit, will lay hold of slight changes to justify the order

4. ———: ———: ———. Even though the mother has been indiscreet, yet, if the evidence shows that since the decree she has married a good man and is living the right kind of life, the court will deem this a sufficient change in her circumstances and character to justify the order made by which the child may be allowed to visit her, especially where for a year after the divorce the husband allowed her to keep the child, and there is nothing to show that the modification of the decree would in any way injure the child.

5. ———: ———: ———. If the circumstances should change requiring the modification to be itself modified in the future, either parent can apply to the trial court for such modification, since the divorce suit on this phase remains open till the child becomes of age.

Error to Jackson Circuit Court.—*Hon. Herman Brumback,* Judge.

AFFIRMED.

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C. R. Penee and *Frank Yeoman* for plaintiff in Error.

Hairgrove & Greer for defendant in error.

TRIMBLE, J.—This is an appeal from an order made by the circuit court, at its September term, modifying a divorce decree rendered at the April term following, the modification being in reference to the custody of the child. The decree gave a divorce to the husband and directed that he "have the care, custody and control of the minor child, George, born of said marriage and the court reserves jurisdiction of this cause for any further orders concerning the custody of said child."

The modification was made upon motion filed and notice was given and a hearing had. The modification order is as follows: "Now plaintiff's motion to modify the decree heretofore rendered herein is by the court heard and sustained to the extent herein mentioned, and it is by the court ordered that the decree be, and it is, modified so as to permit the defendant to have the minor child, George P. Phipps, visit her every Saturday, beginning October 21, 1911, from 9 o'clock a. m. until 5 o'clock p. m., but in no event shall said child be kept after dark; it is ordered by the court that said child be delivered to the office of the clerk of the circuit court, at Independence, Missouri, by the plaintiff, each Saturday at 9 o'clock in the morning and returned to the aforesaid place at 5 o'clock in the evening by the aforesaid defendant."

The husband appeals from this order on the ground that the evidence does not show any new facts upon which a change in the custody of the child can be made; that the court is powerless to act unless the motion contains averments, and the evidence discloses facts showing, that since the decree a change of conditions, circumstances, or situation, or character of the parties, has occurred to justify a modification.

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The right of custody granted by a decree does not deprive the other party of access to the children unless there is an express provision to the contrary. [Burge v. Burge, 88 Ill. l. c. 167.] And even the guilty party is allowed this privilege. [Oliver v. Oliver, 151 Mass. 349.] Though there have been *rare* cases in which it has been refused, where, on account of the depraved character of the party, it was deemed best for the children. So that, under the original decree, the mother would have the right to visit her child at proper and reasonable times and in decent orderly manner. But, if this right were denied her by the father, her only remedy would seem to be to apply to the court, in which the decree was granted, for an order requiring him to allow her that privilege. And in such case the father's refusal to let her visit the child would be a new fact on which the court could modify the decree so as to permit such visits. To hold otherwise would put it in the power of one parent to deny, without reason, the other parent of the privilege of seeing the offspring, which both have brought into the world. In the case of Oliver v. Oliver, 151 Mass. 349, the decree gave the custody of the child to the mother who thereafter refused to let the father see or visit it. The Supreme Court held that even though the evidence, in words, did not show grounds for a modification, yet the trial court could by observation see many things in the character, appearance and manners of the parents testifying, which could not be presented in print, and thereupon refused to hold that there was no evidence on which to base a modification of the decree so as to permit the offending father to see his child.

It will be observed, in passing, that while the terms of the order may have the effect of *changing the custody* of the child from the father to the mother from 9 a. m. until 5 p. m. of each Saturday, yet the evident intention of the order was to permit the mother to have her minor child "*visit* her every Saturday" as the

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order states. But whether the order *changes the custody* or not, the motion does not ask for a change in such custody. After reciting that part of the decree relating to the custody of the child, the motion prays the court to make the decree provide "that the defendant shall have the *right to visit said child* and have said child visit her at any and all reasonable times, or, on stated occasions to be fixed by the court." So that, although the court is without power to *change the custody* of the child, in the absence of new facts to justify such change, this ought not to prevent the court giving the mother a right to visit the child under proper regulations and on certain conditions based merely on the new fact of the father's refusal to let her see it.

But, we will treat the order made as a modification of the decree so far as it relates to the custody of the child, and dispose of the case on that theory.

The order is not complained of because it requires the taking of the child to the clerk's office in Independence every *Saturday,* regardless of the weather, the health of the child, or the ability or reasonable convenience of the father. The sole claim is that the court had nothing on which it could base an order of any kind.

A judgment for divorce, so far as alimony and the support and custody of children are concerned, is not a closed incident like other judgments. As to these matters it can accomplish its true end only by remaining perpetually open for variations to be made from time to time as the changed circumstances of the parties and the children may require. [1 Bishop on Marriage, Divorce and Separation, sec. 822.] As respects the custody of the children, a divorce suit can in its nature terminate only with their majority. [*Ibid,* sec. 826.] And, in addition to this, our statute gives the court power to modify the judgment as to such matters. [Sec. 2381, R. S. Mo. 1909.] But our courts have said that the custody fixed by the judgment cannot be changed except after a hearing and upon new facts or a change

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in the circumstances or character of the parties justifying such change. [West v. West, 94 Mo. App. 683; Diedesheimer v. Diedesheimer, 74 Mo. App. 231; State ex rel. v. Ramey, 134 Mo. App. 722.] And on the contention that the evidence discloses no new facts or changed circumstances appellant asks that the order of modification be reversed and set aside.

The evidence, however, shows that at the time the divorce was granted, appellant agreed with respondent (the mother), that he would allow the child to remain with her, and the child did remain with her for more than a year after the divorce. True, the husband says he agreed to this only on condition that the mother live with her parents and that she violated this condition and began to live elsewhere in surroundings that he did not think were good for the child. He also says she took the child and went to California with it, and that he followed them and found her in bad surroundings and brought the child back, but this was before the divorce, and, after bringing them back to Kansas City, he allowed the child to stay with her for more than a year after the granting of the divorce which gave him the custody of the child. He admits this and says "but she never thought that I was going to take the boy away from her. If she had been living as I thought she ought to live, I would'nt have taken the boy away from her. It was the way she was doing that I took the boy." The mother denies living improperly and says that the father, after the divorce, proposed that she let him have a key to her room, and that it was not until she refused to accord him this favor, that he took the boy away from her by deception and has not allowed her to see or visit him since, or to know where he is. The husband denies only the key part of this accusation.

There was also evidence to the effect that the mother said she would kill the child rather than that her husband should have him; but this was said, if said at all, prior to the divorce and when the separation was

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being contemplated, and while the mother was in stress of mind over the pending separation. There was disinterested testimony to the effect that she showed great affection for the child; and the fact that the father, after the divorce, allowed her to keep the child for a year or more, shows that he was not very apprehensive of her harming it.

After the father took the child away, and before the filing of the motion to modify, the mother married again. Her husband is regularly employed and she has no other child. Her parents and her sisters are also living and they are friendly to the child. Now, while the evidence tends to show that the mother was indiscreet, to say the least, before the divorce, it is not so strong as to her living improperly at the time the father took the child away, as he says, on that account. But granted that she was not living in a way to avoid the appearance of evil at the time he took the boy away, so as to justify him in so doing, yet as she is now married and has about her the protecting care of an industrious man against whom nothing has been said, and she is living as a good woman should, these are facts showing a sufficient *change* in her situation and character to justify the court, who saw the parties and heard them testify, in modifying the decree, not so as to *take the custody* of the child from the father and give it to the mother, but so that the child could visit its mother and not be entirely deprived of her society and affection, nor she of its. Especially is this true when it is seen that, at the time the divorce was granted, the child was left with her, and now, the child is not only taken from her but she is not allowed to see it or even know where it is.

We are of opinion that the judgment of modification in this case should be upheld. If, at any time in the future, circumstances should so change as to make it necessary that this modifying order should be changed or revoked altogether, it is within the power of the

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father, or of either parent for that matter, to apply to the court for such modification or revocation, since the divorce suit, on this phase, remains open, and will stay open, till the child becomes of age. [Oliver v. Oliver, supra, l. c. 352; 1 Bishop on M., D. and S. sec. 826.]

The judgment modifying the decree is affirmed. All concur.

LON BOWMAN, Respondent, v. THE MARCELINE COAL & MINING CO., Appellant.

Kansas City, Court of Appeals, March 3, 1913.

1. **EVIDENCE: Statements: Hearsay.** Evidence given by a witness that another person, not the plaintiff, had said to the witness, when the latter asked how the accident occurred, "I hallowed to Lon that the cage was gone" was, under the circumstances under which it was given, mere hearsay. Although such person had testified that he did not halloo to the plaintiff, this did not make the statement competent since no foundation was laid for contradicting the one said to have made such statement. Nor was the testimony sought to be elicited for this purpose.

2. **———: Excluding Answer: No Proffer Nor Showing Made.** The exclusion of an answer to a question will not work a reversal of a case where there is nothing to show what the answer, if it had been admitted, would have been. It is the duty of the party, alleging error because of excluded evidence, to indicate, by an offer to the trial court, what the evidence is.

3. **———: Opinion of Witness.** A witness, after testifying that defendant's engineer once told him he had nervous spells, further testified that he had known the engineer for twenty years and that his record as an engineer was good, and was then asked whether he considered the engineer "a good safe man." He had already testified to the experience, competency and sobriety of the engineer, and it was neither necessary nor the province of the witness to answer a question which, in the form it was asked, was really, "In your opinion is the engineer a man that would be negligent or careful on this occasion?"

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4. **NEGLIGENCE: Assumption of Risk.** Where plaintiff's injury was not the result of dangers inherent in the nature of his employment but was the result of defendant's negligence in raising and lowering the cage without a signal, there is no assumption of risk in the case. A servant does not assume risks caused by his employer's ngligence. He asumes only the risks which are liable to happen on account of the nature of his employment when the master has used the care that the law requires of him.

5. **———: Contributory.** A cager having to rapidly push a loaded car on to a cage saw the cage in position and started his car to it, leaning far forward with his hands wide apart on the car to exert the necessary force; he knew the car would not move until he gave a signal or first received one from the engineer. Just as the car started to go upon the cage, the latter was suddenly raised about ten feet, remained there just long enough to allow the car to fall into the space it had just vacated, and then was immediately lowered again striking and injuring plaintiff, and both movements without signal. *Held*, that plaintiff was not guilty of contributory negligence in not keeping his eye on the cage or in not stopping to see if the cage would remain in position.

6. **———: Failure to Use Signals: Statute.** Regardless of whether the statute, Sec. 8456, R. S. 1909, required signals for the safety of the cagers, yet, as the evidence showed a system of signals was in use in the movement of the cages, it was negligence to move them without giving the customary signals. To move the cage up and down suddenly and without warning to the men working on the cage would be the grossest negligence.

Appeal from Livingston Circuit Court.—*Hon. Arch. B. Davis*, Judge.

AFFIRMED.

A. W. Mullins, C. M. Kendrick, F. S. Hudson and *John L. Dean* for appellant.

Bresnehen & West for respondent.

TRIMBLE, J.—Action for damages on account of personal injury sustained by plaintiff while working in defendant's mine. The jury awarded $1000, and defendant appeals. The injury came about in this wise:

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Defendant's coal shaft had two cages, known as the east and west cage, attached to a cable coiled upon a drum in such way that, when the engine rotated this drum so as to raise one of the cars, it lowered the other. The engine was on top of the ground about fifty feet from the mouth of the shaft. When one cage reached the top with a loaded car, the other cage was at the bottom with an empty. Two men, known as "cagers," were stationed at the bottom, one of which would immediately rush the empty off the cage and, the moment it cleared the track leading to the cage, the other man would push a loaded car upon the cage. When this loaded car reached the top, the other cage would be at the bottom with an empty which would be taken off by the man, who had just caged the loaded car now at the top, and the other man would push a loaded car into the cage. Thus they would rapidly alternate as the cages went up and down. Whenever a cage reached the bottom it stayed there and was not moved until the cager with a loaded car had got it securely on the cage and gave the signal (one pull on the bell) to the engineer to hoist the cage. No one else had any right to give this signal except the cager who put on the loaded car. This signal was given by pulling a wire which ran from the bottom of the shaft to the top and thence to a bell in the engine room. After a cage was started on its way to the top by one pull on the bell, another pull would stop the cage wherever it was and two pulls would cause the engineer to lower it back to the bottom. And if a cage had been stopped thus in its ascent, the engineer had no right to lower it until he got the necessary two bells, and these could be given only by the cager at the bottom. However, if the engineer desired to hoist the cage without a signal from the cager, he was required to give one blast on his whistle as a warning to the cager below that he was about to move the cage. And if, after hoisting the

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cage for a distance in this way, he stopped the cage, he was required to give two blasts on the whistle before lowering it back to its place.

Plaintiff was one of the two cagers at the bottom of defendant's shaft. The west cage came down with an empty car. Plaintiff's associate cager immediately pushed the empty off the cage along the west track leading from it, and the moment it got in the clear, plaintiff pushed a loaded car, standing on the east track, through the switch to the west track and thence to go upon the cage. While he was thus engaged in pushing the car, with his hands and arms wide apart and leaning forward to exert the considerable force required, the cage, without a signal from anyone at the bottom and without a whistle from the engine, was suddenly raised about ten feet from the bottom of the shaft, remained there just long enough to allow the car plaintiff was pushing to fall into the space vacated by the bottom of the cage, and then, before plaintiff could recover from his stooping posture or the momentum of his body, in time to get out of the way, the cage was suddenly lowered into place without signal or warning whistle of any kind. The descending cage struck plaintiff on the head and injured him.

The negligence alleged was in suddenly raising the car without a signal being given to the engineer or a whistle being received from him, and the lowering of the car without signals.

The court did not err in sustaining the objection to the evidence of P. J. Kelly, defendant's witness, as to what Phil Bowman said to him when he asked Phil how the injury happened. Phil was not the plaintiff, and in the connection in which this testimony was given by Kelly, Phil's statement to him was purely hearsay. Kelly was being examined as to what plaintiff said when Kelly visited him at his home after the injury and Kelly, in answer to that question, interpolated a statement that Phil had told him before he.

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Kelly, saw plaintiff "that he (Phil) had 'hallowed' to Lon that the cage was gone." It is true Phil did say that he did not halloo to Lon. But Phil was never asked if he made to Kelly the statement in question. Hence no foundation was laid to impeach Phil and the excluded evidence was not admissible.

Nor was reversible error committed by the court in sustaining plaintiff's objection to the question asked Kelly, "At whose request was it, if anybody's, that he (plaintiff) was working at this job of extra caging?" First, because there was no offer to show the court what the answer would have been. If we should reverse the case for this alleged error the witness' answer may turn out to be that he, Kelly, requested it or some one else in authority. A mere refusal to hear an answer is not alone sufficient to constitute error, but it is the duty of the party alleging error to indicate what the evidence is which he proposes to elicit. [State v. Arnold, 206 Mo. l. c. 597; State v. Insurance Co., 140 Mo. App. l. c. 159; Louis v. Louis, 134 Mo. App. l. c. 575.] It may be that the words "if anybody's" in the question show that the answer would be that no one requested plaintiff to act; but if so, it does it by inference and not affirmatively. But the exclusion of this evidence need not be justified on this ground alone, if that be too narrow. Under the facts in this case the evidence was not material. Plaintiff was employed in the mine and usually was engaged in other work, but he was an experienced cager and understood that work and was working as an "extra cager." There is no evidence showing that this was more hazardous or required more skill than the work he usually did. The evidence was sought to be elicited on the theory that it bore on the question of assumption of risk. But there is no assumption of risk in this case. Plaintiff's injury was not the result of the inherent dangers of his employment, but the result of either the defendant's negligence in raising and lowering

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the cage without a signal, or of the plaintiff's negligence. The jury found that defendant was negligent and that plaintiff was not, and that the injury was caused by defendant's negligence. A servant does not assume risks caused by his employer's negligence. He assumes only the risks which are liable to happen on account of the nature of the employment when the master has used the care that the law requires of him, under the circumstances, to avoid the result. [Curtis v. McNair, 173 Mo. 270.]

The witness Spies, after testifying that the engineer told him on one occasion that he sometimes had nervous spells, testified, on cross-examination by defendant, that he had known the engineer's record for twenty years and that his record was good, and was further asked if he, the witness, considered him, the engineer, "a good, safe man." To this plaintiff objected and was sustained. There was no reversible error here. The witness had just said the engineer had a twenty years' record as a good one: In doing this he testified to the experience, competency and sobriety required by the statute. [Sec. 8457, R. S. 1909.] In the form the question was asked it really meant "In your opinion is the engineer a man that would be negligent or careful on this occasion?" Having testified to the engineer's experience and good record it was neither necessary for the witness, nor his province, to give the jury his opinion on the subject of the engineer's care.

Plaintiff's instruction No. 1, is unobjectionable. It does not permit him to recover if he voluntarily or negligently assumed an unsafe position, but conditions his right to recover upon a finding that he was "without any fault or negligence on his part." And if anything more specific than this was needed, it was supplied by defendant's instructions as to plaintiff's contributory negligence. Nor is it open to the objection because the whistle signals, to be given by the engi-

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neer, were not for the cagers. The evidence shows otherwise. To move the cages up and down at will, and without notice or warning to the men working on the cage, would be the grossest sort of negligence, and if the signal in use by the engineer was in fact no signal at all, the defendant's negligence is still more apparent. We think the evidence shows that the signals could be heard at the bottom of the shaft, but if they could not, defendant is in a worse position than if they could.

Nor should a demurrer have been sustained on the ground that defendant owed no duty to signal plaintiff before moving the cage. The signals required by section 8456, Revised Statutes, Mo. 1909, are for the benefit of everyone who can be protected by them whether *on* the cage or working about it. Without regard to the statute, a system of signals being in use, it was negligence to move the cage without giving the signal. The case is not founded upon the statutory duty to inaugurate a system of signals. The question of plaintiff's contributory negligence was properly submitted to the jury. He was doing his work in the usual and ordinary way, and was in a stooping position, his body leaning forward as he necessarily had to do. The work was moving rapidly. He saw the cage at the bottom and started pushing his heavy car onto it. He knew the cage would not move until he gave a signal or unless he heard the engineer whistle. That he did not stop and carefully examine to see if the car was still in place would not make him guilty of contributory negligence as matter of law. The case is not like those where a person attempts to cross a track without looking. We fail to see any evidence showing contributory negligence but, if there is, the jury's verdict has settled that.

Plaintiff was struck across the head with the heavy cage, knocked back several feet, rendered partially unconscious, suffered a gash several inches long across

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the scalp, which was pushed backwards; he was disabled for a month, and has since suffered with headache from the effects of the blow. In such case we cannot say $1000 is excessive. Judgment affirmed. All concur.

LUCY COULTER, Respondent, v. THE CITY OF INDEPENDENCE, Appellant.

Kansas City, Court of Appeals, March 3, 1913.

1. **NEGLIGENCE: Pleading: Defective Sidewalk: Duty of City.** In a suit for injuries caused by a defective sidewalk, it is not necessary for the petition to contain an allegation that it was the duty of the city to keep the sidewalk in a reasonably safe condition. Facts must be stated so that from them such duty will arise as a necessary legal conclusion, and, when that is done, this is sufficient so far as alleging the duty of the city is concerned.

2. **———: Existence of Street: Duty of City.** Evidence that the street in question was and had been for years an open public traveled street in the city, that it had been graded some twenty-five years before, that there were houses fronting on both sides of the street at the point in question, that there was a sidwalk along the entire east side of the street, that the sidewalk along the west side, where the injury occurred, ran south to the corner, and that "most everybody" in that locality traveled over that sidewalk, is sufficient to show that it was such as the city was bound to keep in reasonable repair. Especially when the city officers testified, and did not deny the city's acceptance but merely said no complaint of defects in the sidewalk had ever been made to them.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

Allen E. Southern for appellant.

C. M. Carroll and *L. T. Dryden* for respondent.

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TRIMBLE, J.—Damage suit for injuries sustained in consequence of a fall upon a defective plank sidewalk.

The stringers under the sidewalk had rotted and the planks nailed across the stringers had decayed so that the nails no longer held, and the planks were loose.

Plaintiff was walking with her thirteen-year-old son at her side. The son stepped on a loose board which tipped up in time to catch plaintiff's foot and throw her to the ground, spraining her wrist and perhaps otherwise injuring her.

Defendant asks a reversal on the ground that the petition does not state, nor the evidence show, that the street or sidewalk where the injury occurred was one which the defendant was under any obligation to keep in repair.

We do not agree with defendant in this. It is true the petition does not contain the allegation "that it was the duty of defendant to keep the street in a reasonably safe condition for travel" in those words; but it does allege the *facts,* from which, if the facts are true, that duty follows as a necessary legal consequence. The statement found in many such petitions that "it was the duty of the defendant to at all times keep the street in reasonably safe condition" is in reality a legal conclusion arising from the other *facts* pleaded, and if those facts are so pleaded as to necessarily raise the conclusion on the face of the petition, the pleading is good even if the above quoted allegation is not stated in so many words. The cited case of Field v. Railway, 76 Mo. 614, does not militate against this view. There no *facts* were alleged showing any legal obligation on defendant to do what plaintiff complained of its omission to do, and "when a suit is for a breach of duty, the facts out of which it arises must be pleaded;" l. c. 616.

Nor does the petition fail to allege that the street in question, or the sidewalk, was one over which the

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city had jurisdiction or control, or that the sidewalk was not reasonably safe for travel in the ordinary modes; or that the defendant had actual or constructive notice in ample time to have repaired the defect before the injury, had it exercised ordinary care and diligence.

The petition, after alleging the corporate existence of the defendant as a city of the third class, the existence of the sidewalk and street as a public traveled street in said city, and that Dodgeon street, on which the injury occurred, runs north and south and Farmer street intersects it running east and west, proceeds as follows: "That on the 26th day of October, 1910, and for a long time prior thereto, there was on the west side of said Dodgeon street and north of the point where said street intersects said Farmer street, and in front of what is known as the "Cromwell property" a wooden, board or plank sidewalk. That said sidewalk at said point on the 26th day of October, 1910, and for a long time immediately prior thereto was in a dangerous and defective condition in this: That said walk had become rotten and decayed, and the boards or planks in said walk loose; that said walk had been in such condition for such a length of time immediately prior to the said 26th day of October, 1910, as that defendant through its agents, servants, and employees, could by the exercise of ordinary care have discovered the same in time to have repaired and made said walk at said point reasonably safe for travel in the ordinary modes of travel, and that defendant through its agents, servants and employees knew, on the 26th day of October, 1910, or, by exercise of ordinary care and caution might have known, of the unsafe and dangerous condition of said walk in time to have repaired the same.

"That on the said 26th day of October, 1910, while the plaintiff was walking and properly and lawfully passing along and over said board or plank sidewalk,

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at the point aforesaid on said Dodgeon street and while herself in the exercise of ordinary care and caution, and by reason of the carelessness and neglect of the defendant as aforesaid, she, the said plaintiff, was tripped and thrown by one of the loose boards in said sidewalk and thrown with great force and violence, from which fall plaintiff received serious, painful and lasting and permanent personal injuries, to-wit:" Here follows a detailed statement of the injuries. . . "Plaintiff states that by reason of the carelessness and neglect of defendants as aforesaid, and as a direct result of the injuries received, she has been made to suffer" and, etc. We think the petition sufficient.

And so also was the evidence. Miss Carroll, a witness for plaintiff, testified she had lived in Independence for thirty-nine years and Dodgeon street, at the place where the injury happened, was an open, public, traveled street of Independence on the day of the injury and had been as far back as she could remember. Bauder testified that he had been travelling over the street for thirty years. A member of the city council, who was on the street and alley committee in 1910, testified that the street north of the intersection of Farmer street was traveled "quite a bit" by both pedestrians and vehicles. Another witness for defendant testified that the sidewalk where the injury occurred was traveled by most everybody that came from that part of town. The street was graded in 1885, and a sidewalk was along the entire east side of the street. But on the west side, where the injury occurred, the sidewalk ran only to Farmer street. Some of the witnesses said it went to Farmer street but defendant's witnesses say it did not run quite to the Farmer intersection, that from the end of the board walk south to the intersection was a walk made of cinders. There were houses fronting said street on both sides thereof where the plaintiff fell. In the examination of the witnesses, the place in question was re-

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ferred to by both sides, as a street and as a sidewalk. There was no evidence that the street was not a city street or that the city did not assume jurisdiction over it. Some of the members of the defendant's city council testified, and, in an attempt to show that the city had no actual notice of the defective condition of the walk, said that no complaint had ever been made to them of its condition. They did not say it was not a city street or sidewalk. In the absence of such testimony, their statement that no complaint of ill repair was made to them as city officers, would justify the inference that it was a city sidewalk and street. We do not mean to say that because defendant's city officers failed to show affirmatively that it was not a city sidewalk, this relieves the plaintiff of showing that it was. But we do say that the facts in this case, the actual conditions on the ground, the use and travel by the inhabitants of the city for many years, show that it was. And when, in addition to this, the city officers not only fail to deny that it was a city street, or sidewalk, but, in their attempt to show no notice of the defect, say that no complaint had been made to them, this is an added inference that it was a public street and sidewalk of the city. Under the allegations of the petition and the uncontradicted evidence, the sidewalk was one the city was bound to keep in reasonably safe condition, and it would not have been improper for the court to have instructed the jury that it was a city street. [Peltier v. St. Louis, 237 Mo. 686, 692; Benton v. St. Joseph, 217 Mo. 687, 704; Currun v. St. Joseph, 143 Mo. App. 618, 622.] The evidence also showed that the walk was not only not reasonably safe, but that it was dangerous. At least there was substantial evidence to that effect, and, as the jury found that way, we must adopt it. Also that it was in this unsafe condition from the winter of 1909, continuously down to the date of the injury, October 26, 1910. Many planks were rotten and loose, the stringers decayed

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and patched up, in a bad condition to walk over and dangerous. The boards were broken and loose, the biggest portion was rotten and loose. Such was the disinterested testimony offered on behalf of plaintiff. And the time she fell was the first time she attempted to go along this street.

Objection is also made to plaintiff's instruction No. 1 on practically the same grounds as those urged against the petition, to-wit, that it did not submit the question whether the sidewalk was reasonably safe, and that it did not submit the question whether the city had actual or constructive knowledge of the defect for a sufficient length of time before the fall to enable the city, by the exercise of ordinary care and diligence, to have repaired it before the injury. The instruction has been carefully examined and is not open to any of the objections urged, or to any objection. Under the instruction, before the jury could find for plaintiff, the jury had to find that the sidewalk was on a city street at the place in question, that it was not only not reasonably safe for travel but that it was defective and dangerous; that the danger consisted in the boards being rotted and loose, and that such condition had existed for such a long time prior to the injury as that defendant knew, or by the exercise of ordinary care might have discovered the defect in time to have repaired it before the injury; that plaintiff while in the exercise of ordinary care, was tripped and thrown by such defect and, as a direct result of such defect and fall she was injured.

The case should be, and therefore is, affirmed. All concur.

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JOHN WEIDEMEYER, Appellant, v. J. G. WOODRUM, Respondent.

Kansas City, Court of Appeals, March 3, 1913.

1. **REAL ESTATE BROKER: Duties: Right to Commission.** Where a landowner, desiring to exchange his farm lands in another State, is informed by the agent that the latter is working for a land company in such State trying to sell lands it has for sale, and the landowner tells him that, if he obtains a trade out there which he can accept, he will pay him in addition to what the company pays, and the agent either through his own efforts, or by working through the land company and in conjunction with it, secures the landowner a trade for land which the company had for sale, the agent is entitled to his pay. In such case he has earned his commission by bringing the landowner and the land company together so that through the company a trade was obtained.

2. ———: ———: ———: **Abandoning Efforts.** Where the agent has done all that he can do and has enabled the landowner to secure a trade but the agent does not know it because the matter has been kept from him, a letter written after the contract of trade was made but before the deeds were made, saying there was "nothing to" the land company but which letter did not injure the trade in the least, is not an abandonment of effort on the part of the agent such as will bar his right to recover.

3. ———: **Instructions.** It is error to instruct the jury that if the trade was made solely by another agent and defendant has paid him plaintiff cannot recover. First, because the evidence doesn't show it was made solely by such other. Second, the payment of the other agent has nothing to do with plaintiff's right to a commission and is always misleading to a jury.

4. ———: ———. Matters which are not in dispute but which are admitted ought not to be submitted to the jury as among the things it must find before returning a verdict for plaintiff. And to tell the jury that the burden is on plaintiff to establish such admitted fact makes the submission of such admitted fact more prejudicial.

5. **CORPORATIONS: Officer of: Acting in Official or Personal Capacity.** A president of a corporation engaged with plaintiff in selling land cannot, by a mere secret, unrevealed, intangible thought in his own mind, change his efforts from an official to an individual capacity so as to prevent it being the act of the corporation.

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6. ———: **Right to a Judgment.** Where one of the links in plaintiff's chain of facts essential to recovery is in dispute, the appellate court cannot reverse the case and order judgment entered in plaintiff's favor but must remand it for submission to another jury.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,* Judge.

REVERSED AND REMANDED.

W. S. Banta, N. T. Gentry and *W. M. Williams* for appellant.

Harris & Finley for respondent.

TRIMBLE, J.—Action to recover commission as a real estate broker. The jury found for defendant. Plaintiff claims the admitted facts show he should recover the amount sued for; that the jury was erroneously instructed; wherefore he asks a reversal with directions to enter judgment in his favor. Defendant contends that plaintiff must fail without regard to whether error was committed. This assertion, if well founded, disposes of the case. Hence it should be considered first. It is based upon two grounds: First, that plaintiff abandoned his efforts to effect a sale; second, that his efforts did not result in bringing about a trade. To consider these grounds satisfactorily requires a statement of the facts which are these:

Defendant owned a farm of 643 acres in Boone county, Missouri, which he desired to exchange for land in western Kansas. Plaintiff was a real estate agent living in Columbia, Mo., and was in the employ of the Garden City Land and Immigration Company, a real estate corporation at Garden City, Finney county, Kansas. The object of plaintiff's employment with the company was to assist in selling or trading lands it had for sale or trade in said county. Defendant admits that, when he told plaintiff of his desire to trade

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his farm for Kansas land, plaintiff told him of the company and of his connection therewith and of the fact that the company paid him, but that they did not pay enough to make it an object to him. Defendant further admits that "I finally told him if he would get me a deal that suited me and that I would accept, I would pay him $500." Thereupon plaintiff went to Garden City, Kansas, saw Mr. McCue, president of the company, and told him of defendant's farm and his desire to exchange it for Kansas land. McCue said he thought a trade could be made and for defendant to come out to Garden City and look at the land. Plaintiff went back to Columbia and reported to defendant, who declined to go until they should first look at his land. Plaintiff then wrote the company of this, and the company's vice president, Mr. Kiff, came to Boone county and was met by the plaintiff who showed him defendant's farm. Kiff expressed himself as believing a trade could be obtained and, shortly after this, plaintiff went with defendant to the headquarters of the company at Garden City, introduced defendant to the officers of the company and told them in defendant's presence that, if a trade was secured by defendant, plaintiff was to receive $500 from him in addition to the pay he would get from the company. This last the defendant denies.

While at Garden City plaintiff showed defendant the company's maps of the various lands it had for sale or trade, and spent nine days out there showing defendant over various tracts of land.

It is in evidence that McCue was not only president of the company, but that up to April, 1911, he was practically the sole owner of the company; that the company had in charge for sale or trade an immense amount of land, some of which was owned by three men, Dutton, Clark and McCue, and some by Dutton individually; and that the company was en-

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gaged in selling and attempting to sell or trade all of said lands.

In going out from Garden City to look at land plaintiff would frequently accompany defendant, but sometimes Kiff and sometimes McCue would go. But, in the nine days spent out there, all three of the men, McCue, Kiff and plaintiff were working for the company, and plaintiff was working for both defendant and the company. Plaintiff and defendant disagree over whether any of Dutton's individual land was shown him by plaintiff, the latter claiming he did and the defendant insisting that Dutton's name was never mentioned to him. Defendant contends that the only land he had under consideration at that time was land belonging to Clark and McCue. Whether this be true or not the evidence shows that Dutton had an interest in this Clark-McCue land, which defendant says he looked at. At any rate a number of tracts were being favorably considered by defendant but it seems that Clark was not willing to trade, and defendant and McCue went to Hastings, Nebraska, to see Clark who still declined to trade. Thereupon McCue introduced defendant to Dutton and a contract was finally closed between them for an exchange of defendant's farm for some of Dutton's individual land. This contract and exchange was made by McCue although Dutton, before finally closing the trade, took the advice and help of his cousin, St. Clair, who lived in Columbia. Dutton paid McCue for his services in engineering the deal for him. Whether defendant had been shown any of Dutton's individual land before going to Hastings or not, the negotiations between Dutton and defendant began after they reached Hastings and continued from that time until about January 2, when the deal was closed. Plaintiff was not informed of these negotiations nor of the fact that they were being continued after he and defendant returned to Boone county. Being in entire ignorance of the fact

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that defendant had found a man out there with whom he could acceptably trade, and believing that everything connected with the Garden City Land Company had come to naught, plaintiff, a short time before Christmas, wrote defendant a letter in which he expressed the opinion that there was "nothing to the Garden City Land & Immigration Company;" that they, the company, "had nothing" and he "would'nt work for them at any price." At the very time this letter was written defendant had secured a deal which he had accepted, and it was finally closed a few days later. The letter did nothing to hamper or delay the deal and was written long after plaintiff had done all he was required to do to entitle him to a commission. Because, under the peculiar undisputed facts of this case, all plaintiff had to do was to either himself introduce defendant to Dutton, or to bring about a meeting between Dutton and defendant by and through Dutton's agent, the land company. [Veatch v. Norman, 95 Mo. App. 500; Cunliff v. Hausman, 97 Mo. App. 467; Tyler v. Parr, 52 Mo. 249.] Plaintiff was working under and for the land company who had Dutton's lands for sale or trade. Defendant was told this and then agreed that if plaintiff could get him a trade out there he, defendant, would give him $500. Plaintiff brings the land company and defendant together, and both the company and plaintiff show defendant a large amount of land. In this the company and plaintiff were working together; plaintiff, however, is by agreement, to receive pay from defendant also. In the midst of these efforts, and as a direct result of them, defendant finds a deal which he can accept, but which all parties seem to have endeavored to carefully conceal from plaintiff. Plaintiff has really done what was required of him but does not know it, and impatient at the delay, he writes this letter expressing his impatience. This letter had no effect whatever on the trade, as the contract therefor had already been

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signed and the trade was finally perfected a few days later. Under these circumstances his letter was not an abandonment of his agency, and he is not to be denied a recovery upon that ground.

Was it his efforts that brought about a trade? This question is really answered to some degree by what has already been said. Plaintiff's contract was not that he should find one willing to trade on terms that defendant would find acceptable and then attend to the negotiations and bring the parties safely through them to a perfected trade before being entitled to his pay. All he had to do was to bring the parties together and let them do the necessary dickering. He brought them together because he first informed defendant of the company and his connection therewith, then he went to the company and told them of defendant. By his efforts the company came to look at defendant's land and then defendant went with plaintiff to look at the lands which the company had in charge. Plaintiff says he showed defendant the actual land, or part of it, that defendant afterwards traded for. But, whether he did or not, his coworker the land company, agent of the man with whom defendant traded, did do so. If this be true, it cannot be said that his efforts were not the procuring cause of the trade. [Smith v. Truitt, 107 Mo. App. l. c. 6; Bass v. Jacobs, 63 Mo. App. l. c. 396; Jones v. Berry, 37 Mo. App. l. c. 130, and many cases there cited.]

But it is said McCue, in negotiating the contract of exchange, acted as an individual and not as president of the company. He was the practical owner of the company and was its president. He and plaintiff were both working for the company to make a trade for it as agent of Dutton. It is rather difficult to understand how he could change his exertion from an official to an individual capacity and thus defeat plaintiff of his pay, especially when such change is accomplished by noth-

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ing more than a secret, unrevealed, intangible figment of thought buried deep in his own mind. Besides, he does not say so. He never testified. Dutton and defendant are the men who say the land company had nothing to do with the trade. How they know this is hard to tell. Hence it cannot be said that, regardless of error, plaintiff cannot recover. Even if it was necessary that plaintiff should disclose Dutton's name, or show Dutton's land, in order to recover, still to say that he had no right to recover, no matter what error was committed, would be to entirely disregard plaintiff's evidence that he did these things. This would be the same in effect as sustaining a demurrer to plaintiff's evidence when that evidence, if true, was sufficient to entitle him to recover. Hence we cannot say that plaintiff in no event is entitled to recover.

Defendant's instruction No. 3 told the jury that "if the trade was made solely by W. S. St. Clair and the defendant has paid him a fee therefor, then plaintiff is not entitled to recover." This was error, first because the evidence showed that the trade was not made solely by St. Clair. McCue, president of the land company, introduced them and signed Dutton's name to the contract and Dutton paid McCue for his services. It is true, St. Clair, at Dutton's request, advised him as to the farm and St. Clair's influence may have helped induce Dutton to trade, but it was not solely by reason of St. Clair's efforts. Hence there was no evidence to support such an instruction and it should not have been given. [Jones v. Grossman, 59 Mo. App. 195.] Second, the payment of a commission to St. Clair by defendant had nothing to do with plaintiff's right to a commission, and the instruction was misleading and confusing to the jurors, who would readily infer that if St. Clair had helped at all in the trade, and defendant had paid him, then defendant ought not to be made pay again.

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In the first paragraph of plaintiff's instruction No. 1, it told the jury that "it stands admitted that the defendant agreed to pay the plaintiff $500 if the plaintiff could find a purchaser who would exchange land to the defendant for the defendant's farm in Boone county." The court changed this so as to make it read "that if you find, that the defendant agreed, etc.," thus requiring the jury to find what was admitted. And in defendant's instructions the court told the jury that the burden was on the plaintiff to establish the employment for the purpose and on the terms set out in the petition. This unquestionably gave a coloring to the case prejudicial to the plaintiff. It would be all right in a case where those matters were in dispute, but not here. [Anderson v. Bradford, 102 Mo. App. l. c. 435.] In view of the erroneous instructions above mentioned, the case is reversed and remanded for a new trial. Plaintiff insists that the case should be reversed and the trial court directed to enter a judgment for the amount sued for. We think it more in accord with justice that a new trial be had. The trial court was not asked to peremptorily instruct the jury to find for plaintiff even if such an instruction would have been proper. Again, in the submission of the case to the jury by the plaintiff one of the conditions of plaintiff's right to recover was that the jury must find that Dutton's individual land was with the land company for sale. We think the evidence sufficient to show that it was, but there was some evidence to the contrary, which requires that the case be again submitted to a jury. The case is therefore remanded for a new trial. All concur.

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HERBERT E. HARRIS, Respondent, v. McCLINTIC-MARSHALL CONSTRUCTION CO., Appellant.

Kansas City, Court of Appeals, March 3, 1913.

1. **NEGLIGENCE: Employee: Bridge Work: Foreman.** Plaintiff's father was employed by a bridge company as a laborer in building a bridge across the Missouri river. He was standing on a girder seventy-five feet above ground, when knocked off and killed. An electric engine ran a derrick with boom and large heavy chain which was swung around from place to place in the work. The custom was for the chain to be so kept up that it would be higher than the heads of the workmen. The foreman always gave the signal to the engineer to start by calling out "boom around," and it was his duty to call a warning to the workmen if the chain was swinging low. The foreman signalled the engineer and the boom started with the chain lower than the heads of the workmen and no warning of this was given. The chain struck deceased from behind, knocking him to the ground below. It was *held* that defendant, through its foreman, was guilty of negligence and was liable to plaintiff as only surviving child.

2. **DAMAGES: Excessive Verdict.** Where an employee, killed by the negligence of a bridge company, was divorced from his wife, leaving an only child, who lived with the mother, has not abandoned the child, though not then supporting it, a verdict of $2500 in the child's favor was *held* not to be excessive.

3. ———: ———: ———: **Remittitur: Prejudice of Jury.** Where a verdict was for $5000 and the court ordered a remittitur of $2500, it does not follow that a new trial should be had on the ground that the verdict showed prejudice on the part of the jury.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,* Judge.

AFFIRMED.

Gilmore & Brown for appellant.

(1) Evidence on behalf of the plaintiff that defendant should have had a signal man to watch the hook and chain, was no evidence of negligence. Staf-

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ford v. Adams, 113 Mo. App. 72; Champagne v. Hamey, 189 Mo. 709. (2) The practice of defendant in having the boom operated without a signal man or without having the foreman watch it, was not negligence, and the jury should have been so instructed. Aerkfetz v. Humphrey, 145 U. S. 418; Lowring v. Railroad, 128 Mo. 349; Galvin v. Railroad, 162 Mass. 533; Schraible v. Railroad, 97 Mich. 318; Moules v. Canal Co., 141 Pa. St. 632; Allard v. Contract Co., 116 Pac. 445. (3) Defendant had a right to rely upon Harris' fellow-servants acting with good sense and discretion toward each other. The injury being the result of a failure on their part to do so, there can be no recovery. Relyea v. Railroad Co., 112 Mo. 86; Ryan v. McCullough, 123 Mo. 636; Chrismer v. Telephone Co., 149 Mo. 212; Pulley v. Oil Co., 136 Mo. App. 172. (4) Plaintiff, if entitled to recover, could only recover for such support as he would have received from his father until he attained his majority. Goss v. Railroad, 50 Mo. App. 614. (5) Conjectural damages will only be allowed for parental care and nurture, of which there was a total absence in this case. Parsons v. Railroad, 94 Mo. 286; Ellingson v. Railroad, 60 Mo. App. 679. (6) The verdict, being grossly excessive, can have only been reached as the result of passion and prejudice on the part of the jury, and therefore demands a new trial. Doty v. Steinberg, 25 Mo. App. 328; Chitty v. Railroad, 148 Mo. 64; Gibney v. Transit Co., 204 Mo. 704; Koeltz v. Bleckman, 46 Mo. 320; Ice Co. v. Tamm, 90 Mo. App. 189; Norris v. White, 158 Mo. 20. (7) The remittitur in the trial court does not cure the defect of so excessive a verdict. Partello v. Railroad, 217 Mo. 645.

E. R. Morrison, James E. Nugent and *Horace M. Fox* for respondent.

(1) The demurrers of the defendant were properly overruled. Jordan v. Structural Co., 197 Mass.

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43; Railroad v. Fox, 31 Kan. 586; Brick and Tile Co. v. Shanks, 69 Kan. 306; Dayharsh v. Railroad, 103 Mo. 570; Koerner v. Car Co., 209 Mo. 141; Stewart v. Railroad, 149 Mo. App. 456. (2) The judgment in this case is not excessive. Sipple v. Gas Light Co., 125 Mo. App. 94; Gamache v. Tin Foil Co., 116 Mo. App. 596; Keller v. St. Louis, 156 Mo. 596; Shannon v. Shannon, 97 Mo. App. 119; Voelker v. Construction Co., 153 Mo. App. 1; Knight v. Lead & Zinc Co., 75 Mo. App. 541; Tillie v. Railroad, 29 N. Y. 252; McIntire v. Railroad, 37 N. Y. 287; Stoher v. Railroad, 91 Mo. 509; International Railroad v. Kuehn, 2 Tex. Civ. App. 216. (3) The verdict in this case was not the result of passion and prejudice. Cook v. Printing Co., 227 Mo. 471; Chitty v. Railroad, 166 Mo. 435; Burghill v. Norton, 175 Mo. 206; Partello v. Railroad, 240 Mo. 122.

ELLISON, P. J.—Defendant was engaged in constructing the iron and steel superstructure to a bridge across the Missouri river at Kansas City, Missouri. Plaintiff's father was an employee with others under the direction and superintendence of a foreman. At the time in question he was at work near seventy-five feet from the ground and was knocked off the bridge by a heavy chain attached to a boom, as it was being swung around. He fell to the ground and was killed. He was divorced from his wife and he left plaintiff, a boy ten years of age, as his only child. Plaintiff brought this action for damages and obtained a verdict for five thousand dollars, of which twenty-five hundred dollars was remitted in the trial court.

There was a demurrer to the evidence, overruled by the court. We will not set out a detailed statement of the facts; but we will accept the evidence in plaintiff's behalf tending to prove the issues tendered by him, as the facts of the case. Deceased was thirty years of age at his death and was strong in body, in-

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dustrious, and generally in good health. He was earning four dollars per day. He was standing on a steel girder high above the ground engaged with others in constructing the bridge, the foreman being near by. An engineer in charge of an electric engine operated a derrick. When a signal was given to the engineer by the foreman, he would start it, and the boom with a heavy chain attached would begin to swing around at a speed of a man's ordinary walk. A coworker would guide the boom by means of two swing lines, one in either hand. There was evidence tending to show that when swinging around, the chain should be higher than the heads of the workmen, or, if not, that a warning should be given of its coming. In the instance resulting in deceased's death, the foreman signalled by crying out to the engineer, "Boom around," when it started with the chain above the girders but lower than the heads of the men. He did not cry a warning for the chain, and as it passed around approaching deceased from behind, it knocked him off. The jury could well infer from the evidence that the foreman's failure to give warning of the chain, or to notice deceased's peril, was from the fact that after giving the signal he began a conversation with some one.

On the question of contributory negligence of deceased, it is suggested that the order of the foreman, "boom around," was a warning which he must have heard, since others further away heard it. But it was rightly a question for the jury whether deceased could not well have relied upon a look-out warning if the chain was low enough to strike him, especially as he was known to be at work with his back to it, and that it was known to be the foreman's duty to watch the chain, or appoint some one to do it.

We have not discovered any ground for attributing the injury to the negligence of deceased's fellow-servants.

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We have no doubt of the propriety of the action of the court in refusing defendant's demurrer. The foreman stood for the defendant and the latter is liable for his neglect. [Miller v. Mo. Pac. Railway, 109 Mo. 350; Stewart v. Railway Co., 149 Mo. App. 456; Dayharsh v. Railway Co., 103 Mo. 570; Jordan v. New England Structural Co., 197 Mass. 43.] This last case is one with many facts similar to the case at bar.

The only matter which has given us any concern is the amount of the verdict. Defendant calls attention to the fact that plaintiff was only entitled to his pecuniary loss and that he was living with his divorced mother. But the evidence does not show that deceased had abandoned him, or that he did not intend to discharge parental duty to him. On the contrary it shows that he corresponded with him and asked him more than once to come to him. The letters show an expectation to visit the child and disclose affectionate consideration. The fact that the trial court required a reduction of the verdict one-half, is not conclusive of prejudice on the part of the jury, as is evidenced by the action of the Supreme Court in the following cases: Partello v. Railway Co., 240 Mo. 122; Chitty v. Railway Co., 166 Mo. 435; Cook v. Globe Printing Co., 227 Mo. 471.

While the jury must have a basis for the sum awarded, yet the damages are necessarily in great part conjectural.

We conclude we should not interfere and hence affirm the judgment. All concur.

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INA TIFFANY, Respondent, v. TIMES SQUARE AUTOMOBILE CO., Appellant.

Kansas City Court of Appeals, March 3, 1913.

1. **Sale: Caveat Emptor: Representations:** If a dealer in automobiles is informed that a purchaser knows nothing of them and must depend altogether upon the dealer in getting one that will be suitable for the purposes disclosed, such purchaser may properly rely upon the representations of the dealer as to the quality of the machine.
2. **WRITTEN CONTRACT: Parol Evidence: Fraud.** The rule that the terms of a written contract cannot be varied by oral evidence does not prevent one from showing that the sale evidenced by the contract was induced by fraud.
3. ———: ———: **Fraudulent Inducement: Contract: Inquiry.** Where a written contract of sale of personal property recites that all conditions and representations are embodied in the paper, it will not prevent parol evidence showing fraudulent inducement to the sale. One cannot make a binding contract that his fraud cannot be inquired into.

Appeal from Jackson Circuit Court.—*Hon. Jos. A. Guthrie,* Judge.

AFFIRMED.

Reed & Harvey for appellant.

Parol evidence is not admissible to vary the terms of a written contract. The fraud which will defeat a written contract is fraud in the procurement of its execution; there is no claim or evidence of fraud of this character in the case at bar. Johnston v. Ins. Co., 93 Mo. App. 580; Burrows v. Altar, 7 Mo. 424; Girard v. Car Co., 123 Mo. 358; Och v. Railway Co., 130 Mo. 27; Crim v. Crim, 162 Mo. 544; Kaufmann v. Railway Co., 95 Mo. App. 459; Magee v. Verity, 97 Mo. App. 486; Caterlin v. Lusk, 98 Mo. App. 187; McNeely v. Baldridge, 106 Mo. App. 17; Paris Mfg. Co. v. Carle, 116 Mo. App. 581; Hendrix v. Vivion, 118 Mo. App. 417; Insurance Co. v. Winn, 125 Mo. App. 384.

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John C. Stearns and *C. F. Mead* for respondent.

The question in this case is not one concerning the admission of parol evidence to vary the terms of a written contract as assumed in appellant's brief. By reason of the trust imposed in the appellant and of the fraud and deceit of the appellant's agent in misrepresenting the character of the machine sold, there was no valid sale in this case and the defendant had the right to rescind such sale. Cahn v. Reid, 18 Mo. App. 115; Jewelry Co. v. Withaup & Co., 118 Mo. App. 126; Equitable Mfg. Co. v. Waful, 131 Mo. App. 212; Phelps v. Jones, 141 Mo. App. 228.

ELLISON, P. J.—Defendant was a retail dealer in automobiles and sold one to plaintiff for eight hundred and fifty dollars. Plaintiff claims that her purchase was induced by the fraud and deceit practiced upon her by defendant's agent and that as soon as she discovered the fraud she offered to rescind and tendered the machine back and demanded the return of the purchase money. On defendant's refusal to rescind she instituted this action for the purchase price, setting up the fraud she claims was perpetrated upon her. She recovered judgment in the trial court.

The evidence shows that plaintiff knew nothing of the qualities of an automobile and that she so informed defendant's agent and told him the use she wanted to make of the machine she should purchase and that she would have to depend on him to furnish her what she desired. It further shows that the agent represented the machine to be fit for the purposes for which plaintiff wanted it. That it was a first class car and would meet all the requirements stated to him by plaintiff. That plaintiff then bought and paid for the car. That defendant's representations were false and fraudulent, the car being worthless, and that upon discovering the fraud she tendered it back and demanded the money she had paid.

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The foregoing facts will justify the judgment and lead to an affirmance (Cahn v. Reid, 18 Mo. App. l. c. 126, 130), unless prevented by the following additional consideration, which is the defense relied upon by defendant. At the time of the purchase defendant executed a bill of sale in these words: "1 second hand Royal Tourist car with new top and wind shield, 5 lamps, horn and generator, . . . $850," to which was appended the following written contract signed by both parties, viz.: "This instrument indicates the property purchased from the Times Square Automobile Company, by the undersigned vendee. It is the complete and entire contract between the parties, and no representations, warranties or conditions other than those appearing hereon will be binding upon either party.

Delivery of the property above described is hereby acknowledged to have been made to the undersigned vendee at the place of business of said Times Square Automobile Company."

Defendant insists that the evidence received by the court as to the purchase and of the fraudulent representations, was in violation of the fundamental rule that parol evidence will not be received to vary, alter or add to the terms of a written contract, citing: Johnston v. Ins Co., 93 Mo. App. 580, 589, 591; Och v. Railway Co., 130 Mo. 27, 43; and Crim v. Crim, 162 Mo. 544, 553.

We think the rule thus invoked does not apply to the case made by plaintiff. She has not added to or varied the terms of the contract. Nor does she charge, nor did she prove, that there was any fraud in getting her to sign the paper, nor does she desire to vary its terms. She knew its terms and that she was signing it. The fraud was in the representations of the character of the machine, a matter foreign to the writing. In Elgin Jewelry Co. v. Withaup & Co., 118 Mo. App.

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126, 132, the St. Louis Court of Appeals, per GOODE, J., said:

"We do not understand the law to exclude oral evidence that the purchase of personal property was induced by fraudulent representations regarding its quality in actions for the price even if there was a written order or bill of sale. In an action on the contract, or some warranty of it, for damages for a breach, this might be the rule. But where the sale was rescinded for fraud and the rescission is interposed as a defense to an action for the price, testimony is received in proof of the fraud."

That statement was adopted by this court in Equitable Mfg. Co. v. Waful, 131 Mo. App. 211.

The words of the contract have full force and application as to representations, warranties and conditions culminating in a sale. But they do not mean that fraud should not be inquired into. One's written contract may be such as to show that fraud, as known to the law, has not been committed; but we think it would not be permissible for a party to make a binding contract that his fraud shall not be shown, any more than it would that his crime should be closed from view by the terms of a written paper.

The judgment is affirmed. All concur.

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By JOHN M. CLEARY.

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ACCIDENT INSURANCE.

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2. **Policy: Hazard: Risk: Manual: Evidence.** A policy of accident insurance provided that if the insured suffered injury "while exposed to the hazard of an occupation classed by the company as more hazardous than that" stated in the policy, the liability should not exceed such portion of the principal as the premium paid would purchase at the rates fixed by the company for such more hazardous occupations. These more hazardous occupations and classifications of risks were set out in the company's manual, but this manual was not mentioned nor referred to in the policy. It was *held* that its introduction in evidence was properly refused. Ib.

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APPEAL AND ERROR. See Appellate Practice; Certiorari.

1. **Absence of Motion.** Appeal may be taken without motion for new trial or in arrest. In such case the appellate court will examine the record proper but will consider only errors fatal to the action or to the judgment. Mere formal defects, though patent of record, will not be considered. Newton v. St. Louis, etc. Co., 199.

2. **Abtract of Record: Supersedeas.** When an appeal is taken and no stay or *supersedeas* granted, nor a full transcript or printed abstract of the record filed within the time required by Sec. 2048, R. S. 1909, it is not the duty of the appellate court to obtain the record in a manner not provided by the statute. State v. Dempsey, 298.

3. **Duty of Court.** When a full transcript of the record has been lodged in the appellate court in the time prescribed by the statute, it is the duty of the court to render judgment on the record regardless of the absence of an abstract, statement or brief. Ib.

4. **Affidavit for.** An affidavit for appeal, made by appellant's attorney of record and in fact, fulfills the requirements of Rev. Stat. 1909, sec. 2040, as to who shall make the appeal affidavit. It is not necessary that the affidavit designate in what capacity the party making same assumes to act. Pile v. Allison, 636.

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1. **Conclusiveness of Verdict.** A verdict rendered on conflicting evidence is conclusive, on appeal. Thornton v. Mersereau, 1.

2. **Binding Effect of Theory at Trial: Trial Practice: Partnership.** In an action for services rendered, where evidence offered by plaintiff, tending to prove a partnership between the parties for the performance of the work sued for, is received without objection by defendant, the defense of partnership will be considered, although defendant's answer is merely a general denial. Ib.

3. **Review of Matters of Exception: Prerequisites.** Unless an exception to the order overruling the motion for a new trial appears in the bill of exceptions, all inquiry into the proceedings at the trial is closed to the appellate court, and only the record proper is open to review. Murphy v. Lorwood Cooperage Co., 11.

4. **Review of Matters of Exception: Prerequisites.** Unless an exception to the order overruling the motion for a new trial appears in the bill of exceptions all inquiry into the proceedings at the trial is closed to the appellate court, and only the record proper is open to review. Angel v. Portageville, 16

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APPELLATE PRACTICE—Continued.

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7. **Pleading: Sufficiency of Petition: Waiver of Defects by Verdict.** However defective a petition may be, if the necessary facts can be implied from what is defectively stated, the defendant will not be heard to object, after verdict and judgment, on the ground that the petition will not sustain a judgment; such objection being available only when the petition entirely fails to state a cause of action. Ib.

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9. **Review: Action for Maintenance: Taking Case Under Advisement: Necessity of Exception.** In a suit by a wife for separate maintenance, the action of the trial court in taking the case under advisement and postponing its decision to a later date to give the parties an opportunity to become reconciled, cannot be reviewed, on appeal, in the absence of an exception to such action. Creasey v. Creasey, 98.

10. **Reviewing Matters of Exception: Necessity of Motion for New Trial.** Where the appellant does not assign error on the record proper, the appellate court will review only those matters that have been finally passed upon by the trial court on the motion for a new trial. Byrd v. Vanderburgh, 112.

11. **New Trial: Grounds of Motion: Verdict against Weight of Evidence.** A ground of a motion for a new trial, that "the verdict and judgment are for the wrong party," and a ground that "the verdict and judgment are contrary to the evidence," are, in substance, the same as a claim that "the verdict and judgment are contrary to the greater weight of the evidence," which is not a ground of appellate interference. Ib.

12. **Conclusiveness of Verdict.** The appellate court will not disturb a judgment of the trial court on the ground that the verdict returned was contrary to the greater weight of the evidence. Ib.

13. **New Trial: Grounds of Motion: Sufficiency.** A ground in a motion for new trial, that the judgment and verdict are against the law, is not sufficiently specific for consideration. Ib.

14. **Sustaining Demurrer to Evidence: Harmless Error.** The error in sustaining a demurrer to plaintiff's evidence as to a part of the property involved in an attachment suit was made harmless by the rendition of judgment for plaintiff as to such part of the property. Ib.

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APPELLATE PRACTICE—Continued.

15. **Reviewing Admission of Evidence: Necessity of Exception.** The admissibility of evidence will not be considered, on appeal, where no exception was saved to the ruling admitting it. Byrd v. Vanderburgh, 112.

16. **Excluding Evidence: Harmless Error.** The error in excluding evidence relating to an item of property, in controversy as to which judgment was rendered for appellant, was harmless. Ib.

17. **Conclusiveness of Findings of Fact.** It is not the appellate court's province to interfere with findings by the trial court which depend upon the credibility of witnesses. Ib.

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19. **Binding Effect of Theory at Trial: Attachment.** The denial of a motion to dismiss an attachment on the ground that it was obtained by means of a fraudulent levy and that the court, therefore, had no jurisdiction will be reviewed, on appeal, and the question of jurisdiction raised by it determined, where the parties and the trial court proceeded on the theory it was a proper mode of raising that question. Matthews v. Eby, 134.

20. **Equity Case: Entire Evidence.** In the absence of some of the evidence in an equity case, the appellate court will not pass on the question whether, upon the evidence, the court erred in modifying the referee's report. Kansas City v. Forsee, 213.

21. **Equity Case: Partial Record.** Where appellant, in an equity case, fails to bring the entire evidence before the appellate court, appellant's claim of the insufficiency of the evidence will not be considered. Hull v. Hull, 220.

22. **Finding by Commissioner of Appellate Court: Conclusiveness.** The appellate court will defer to the finding of facts of a special commissioner appointed by it, where the evidence is conflicting and the witnesses appeared and testified before the commissioner. In re Selleck, 391.

23. **Review: Motion to Affirm Justice's Judgment: Necessity of Saving Exception.** The ruling of a circuit court sustaining a motion to affirm a judgment of a justice of the peace for failure of the appellant to give notice of the appeal cannot be reviewed by the appellate court, unless the motion and an exception to the ruling thereon are preserved in the bill of exceptions. Silverberg v. Gitenstein, 399.

24. **Same: Necessity of Motion for New Trial.** The ruling of a circuit court sustaining a motion to affirm a judgment of a justice of the peace for failure of the appellant to give notice of the appeal cannot be reviewed by the appellate court, unless such ruling was brought to the attention of the trial court by a motion for a new trial or rehearing. Ib.

25. **Matters of Exception: Necessity of Motion for New Trial.** Matters of exception are not open to review, on appeal, unless the bill of exception preserves the motion for a new trial, calling the attention of the trial court to such exceptions, and also preserves an exception to the denial of such motion. Ib.

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APPELLATE PRACTICE—Continued.

26. **Divorce: Conclusiveness of Findings of Fact.** Although, in divorce cases, great deference should be paid to the conclusions of the trial judge on evidence given by witnesses who testify before him, the duty is imposed upon the appellate court to pass on the evidence and determine the case on its view of the evidence. Barth v. Barth, 423.

27. **Binding Effect of Theory at Trial: Negligence: Pleading.** Where the petition, in an action for personal injuries, is constructed on the "turntable doctrine" of negligence and the case is submitted to the jury on that theory, plaintiff is bound by that theory on appeal. Hight v. American Bakery Co., 431.

28. **Error on Record Proper: Correcting Erroneous Judgment.** The error in a judgment enforcing a special taxbill, providing that the judgment shall bear interest at the rate of eight per cent per annum, instead of six, is an error on the face of the record proper, and the appellate court will notice and correct it, although the appellant's motion for a new trial does not complain of it. Granite, etc. Co. v. Parkview, etc. Co., 468.

29. **Questions Reviewable: Special Taxbills: Amendment.** The amendment of a special taxbill for street improvements, so as to name a different person as owner of the property assessed from that originally set out, is immaterial, where no question is raised as to the validity of the amendment, and where, in a proceeding to enforce the taxbill, no objection is made to its admission in evidence, as amended. Ib.

ASSAULT AND BATTERY.

1. **Damages for: Scope of Employment.** When an assault occurs, if the person who commits the assault (when an employee as well as an officer of the law) acts within the scope of his employment and under instructions of his employer, any wrongful act in his conduct is chargeable to the employer. Murphy v. Southwest, etc. Co., 588.

2. **Respondeat Superior.** If the act done was within the scope of the duty imposed upon the employee by the employer by his contract of service, the principle, "*respondeat superior*," applies. Ib.

ASSUMPTION OF RISK. See Negligence.

ATTACHMENTS. See Appellate Practice.

1. **Fraudulent Conveyances: Possession: Burden of Proof.** In attachment proceedings involving the right to possession of chattels claimed by an interpleader as purchaser from the debtor, the burden is on the interpleader to show that he took actual possession upon purchasing, as required by law. Byrd v. Vanderburgh, 112.

2. **Fraud and Deceit: Debt Fraudulently Contracted: Implied Misrepresentations.** After the purchase price of chattels had been agreed upon and just before they were turned over to the buyer, he told the seller that he could not pay the purchase price then because he did not have his check

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ATTACHMENTS—Continued.

book with him, and that he would send the seller a check when he got home. In an action by the seller by attachment, on the ground the debt was fraudulently contracted, it being admitted by defendant that he had no money in bank at the time of the transaction, *held*, that defendant's statement amounted to an affirmation that the money was in bank to meet the check and that it was a mere matter of his getting to his check book in order to make payment; that such affirmation was false; that it related to a material fact; that plaintiff's reliance upon it may be inferred; and that the false impression was given by defendant to induce plaintiff to consent to the debt and that plaintiff yielded his consent on the faith thereof may be inferred; and hence it is *held*, that there was sufficient evidence to warrant a finding that the debt was fraudulently contracted so as to justify an attachment under Sec. 2294, R. S. 1909. Matthews v. Eby, 134.

3. **Jurisdiction: Venue.** Where an action by attachment is commenced in the county in which plaintiff resides, but in which defendant does not reside, and summons is not served on defendant in such county, the jurisdiction of the court depends upon the validity of the attachment. [See Sec. 1751, R. S. 1909.] Ib.

4. **Unlawful or Fraudulent Levy.** An attachment levy effected by unlawful or fraudulent means is illegal and void and confers no jurisdiction. Ib.

5. **Jurisdiction: Fraudulent Levy.** Where a creditor, desiring to prevent the removal from the county in which he resided of property of his debtor, temporarily there, having a single cause of action for a sum too great for the jurisdiction of a justice of the peace, split it and had the property seized on two attachments issued by a justice, and subsequently, in the absence of the debtor, dismissed said attachments and had the property seized on an attachment in a suit in the circuit court, the levy under the latter attachment, having been effected by means of the other fraudulent attachments, gave no jurisdiction. Ib.

6. **Trial Practice: Jurisdiction: Mode of Presenting Question.** In an action by attachment, whether a motion to dismiss is a proper mode of presenting the question that the court did not have jurisdiction because of the fact that the levy was effected by fraudulent means, *quaere*. Ib.

7. **Grounds For: Evidence Insufficient.** That the defendant had left the town in which he resided, saying that he would not return, and that it was not known by any of the witnesses where he was up to the time of the trial, is not sufficient evidence to support a finding that the defendant was not a resident of Missouri or that he was about to move out of the State, with the intent to change his domicile. Thomas v. Brown, 667.

ATTORNEYS. See Fire Insurance.

Disbarment: Misconduct of Attorney: Commissioners' Findings Approved. In a proceeding to disbar an attorney, special commissioners appointed by the appellate court found from the evidence that respondent had entered into a conspiracy to effect a pretended sale of a stock of goods so as to defraud the creditors of the pretended vendor, that said

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ATTORNEYS—Continued.

fraudulent scheme was carried out, and that, in litigation arising out of it, respondent gave perjured testimony and suborned one of the conspirators to give perjured testimony; and further found that respondent, either by impersonating a deceased client, or otherwise, unlawfully obtained access to decedent's safety deposit box, and unlawfully took therefrom certain notes and deeds of trust belonging to decedent and converted them to his own use, with the intent of depriving the true owners of their property, and that respondent falsely pretended that decedent had entered into a written contract with him, whereby said notes and deed of trust were transferred to him, and falsely pretended that such contract was stolen from his desk, whereas in fact no such contract was ever executed. *Held*, that said findings are supported by the evidence; *held, further*, that, under said findings, the conclusion of law found by the commissioners, that respondent is not a fit or proper person to practice law in this State, is correct and hence it is *held* that his license to practice law in this State should be revoked. In re Selleck, 391.

AUTOMOBILES. See Negligence.

BANKS AND BANKING. See Trusts.

1. **Checks: Time for Payment: Negotiable Instruments.** A check is payable on demand, and if nothing more appears, the bank on which it is drawn must either pay or reject it on presentment. Pollack v. National Bank of Commerce, 368.

2. **Same: Extending Time by Agreement: Custom: Negotiable Instruments.** A depositor who presents a check for deposit drawn by another depositor may make a valid agreement with the bank that payment shall be deferred for a reasonable time, until the bank can ascertain whether or not there are sufficient funds of the drawer in its hands to pay it; and such an agreement may be established from a custom to that effect, which was well known to both parties and obtained in good faith throughout an extended course of dealing between them. Ib.

3. **Deposit of Checks: Right of Bank to Charge Back Worthless Checks: Custom: Negotiable Instruments.** Where a depositor of a bank presented to it, for deposit, a check drawn by another depositor, with knowledge of a custom of the bank to give the depositor credit for checks deposited, subject to the right of the bank to reject the deposit and charge the amount back to the depositor at any time during the same day, if it discovers that the drawer of the check has not sufficient funds on hand to pay it, the depositor was estopped from asserting that the bank, after giving him credit for the deposit, could not, on the same day, on finding insufficient funds to pay the check, charge his account with the amount thereof. Ib.

BASEBALL. See Negligence.

BENEFIT CERTIFICATE. See Life Insurance.

Disease: Evidence: Peremptory Instruction. Though a trial court may, in proper instances, direct a verdict for the defendant, yet where the evidence sustaining the defense is of an uncertain or indefinite character, such as to the time when treatment was given for a disease, or as to the kind of disease, the court would be without right to so instruct and properly refused to do so. Logan v. Court of Honor, 195.

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BILLS AND NOTES. See Banks and Banking.

1. **Indorser After Maturity: Collateral Security.** The payee of a note, who indorses and delivers it to another, after maturity, as collateral security for the payment of another note, made by the payor, cannot be regarded as an accommodation indorser. His position is the same as it would have been had he, as payee, made an outright sale of the note. Gate City National Bank v. Schmidt, 153.

2. **Notice of Protest: Accommodation: Indorser.** An indorser for whose accommodation a loan is made and who, on the dishonor of the note, is not entitled to due presentment and notice of protest, is one whose real relation to the maker is that of primary debtor. Ib.

3. **Indorsement After Maturity.** The indorsement of a negotiable promissory note by the payee after maturity is equivalent to drawing a new bill at sight and the same diligence in making demand and giving notice is required to charge the indorser. Ib.

4. **Demand: Reasonable Time.** When a note is indorsed after maturity, it becomes a note payable on demand, and demand must be made within a reasonable time. The delay of a year would be unreasonable and operate to discharge the indorser. Ib.

5. **Defenses.** In a suit on a promissory note for the purchase price of a binder it was permissible for the defendant to plead both a failure of consideration and also a breach of the warranty as a counterclaim, where the same were not inconsistent. Acme, etc. Co. v. Gasperson, 558.

6. **Failure of Consideration.** The plea of failure of consideration goes only to the extent of the purchase price and the proof is confined to showing that the machine did not measure up to the terms of the warranty, express or implied. Ib.

7. **Breach of Warranty as Counterclaim.** As a counterclaim the recovery may be had for a greater or less amount than plaintiff's claim and the pleading and proof would extend to special extraneous damages. Ib.

BILLS OF EXCEPTIONS. See Appellate Practice; Mandamus.

1. **Verity: Not Impeachable by Affidavits.** Where the trial judge refused to sign a bill of exceptions tendered to him, on the ground that it incorrectly recited that an exception was saved to the order overruling the motion for a new trial, and the bill, as signed by him and filed of record, contained no such exception, an affidavit made by counsel for the party who filed the bill, which was not filed with the trial court but was merely inserted in the abstract of the record filed by him in the appellate court, that he had duly saved such exception, did not have the effect of correcting the bill or supplying such exception; Secs. 2030, 2031 and 2034, R. S. 1909, providing the only mode of bringing a bill of exceptions before an appellate court where the trial judge refuses to sign it on the ground it is not a true bill. Murphy v. Lorwood Cooperage Co., 11.

2. **Same.** Affidavits contradicting a bill of exceptions which has been regularly signed and filed cannot be regarded. Ib.

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BILLS OF EXCEPTIONS—Continued.

3. **Verity: Not Impeachable by Affidavits.** Where a bill of exceptions, as filed, did not show an exception to the order overruling the motion for a new trial, such exception could not be supplied by affidavits of counsel for the party who filed the bill that it had been duly saved by them and that the trial court refused to settle and sign a bill tendered by them, showing it; following Murphy v. Cooperage Co., *ante*. Angel v. Portageville, 16.

4. **Refusal to Sign: Untrue Bill.** A trial judge is justified in refusing to sign a bill of exceptions which is untrue. State ex rel. v. Allen, 463.

5. **Contents: Default Judgment: Motion to Set Aside.** Where, on appeal from a justice's court, the judgment of the justice is affirmed because of appellant's failure to prosecute his appeal, and appellant subsequently moves to set aside such judgment and appeals from the denial of this motion, matters that occurred at the time the judgment by default was entered are immaterial to a consideration, on appeal, of the motion to set aside said judgment, and should not be incorporated in the bill of exceptions; and hence the trial judge would not be justified in refusing to sign the bill because such matters were omitted. Ib.

6. **Judicial Notice.** Matters that occurred before the trial judge, of which he took judicial notice, should be incorporated in the bill of exceptions in order that the appellate court may consider them; and hence the trial judge would not be justified in refusing to sign the bill because such matters were incorporated in it. Ib.

BROKERS. See **Real Estate Brokers.**

BURDEN OF PROOF. See **Attachment; Evidence; Life Insurance; Negligence; Sales; Special Tax Bills.**

CARRIERS OF GOODS.

1. **Delayed Shipment: Jury Question.** In an action prosecuted by a shipper of perishable property to recover damages resulting from negligent delay in the transportation of the shipment, the defendant contended that a severe storm caused the delay in the yards of a connecting railroad, and hence there was no negligence on its part. *Held*, that the demurrer to the evidence was properly overruled, and the question of negligent delay was rightfully submitted to the jury. Unionville Produce Co. v. Chicago, etc. Ry. Co., 168.

2. **Unusual Delay: Accidental Causes.** Proof of an unusual delay is not proof of negligence since such delays often result from accidental or unusual causes which reasonable care would not anticipate. Ib.

3. **Same: Question for the Jury.** The fact of unusual delay with slight evidence of neglect will suffice to take to the jury the issue of whether the delay was negligent or excusable. Ib.

4. **Acceptance of Freight: Notice of Delay.** The acceptance of a shipment of freight by a carrier without notice to the shipper that there may be delays, is equivalent to an assurance that it will be delivered in a reasonable time, except for the intervention of excusing causes of subsequent occurrence. Ib.

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CARRIERS OF GOODS—Continued.

5. **Instructions: Definitions.** When the defendant objects to an instruction of the plaintiff's concerning a definition of its negligence, it should be taken advantage of, by its own instruction. Unionville Produce Co. v. Chicago, etc. Ry. Co., 168.

CARRIERS OF LIVE STOCK.

1. **Delay in Shipment: Evidence.** A showing of mere delay and nothing more is insufficient to support a recovery of damages for delay in the transmission of live stock. But when the delay is shown under such surroundings as to raise even a slight inference that the delay had its origin in negligence, this is sufficient, especially in the case of an unaccompanied shipment, and the knowledge of what caused the delay is with the carriers and not the shipper. Muir v. Missouri, etc. Ry. Co., 542.

2. **Inference of Negligence.** Where, in addition to the delay, it was shown that there were no accidents or trouble of any kind, that the route was clear and open, no washouts, wrecks or breakdowns, that the trains ran when they did run, without a hitch of any kind, this was sufficient to raise an inference of negligence. Under these circumstances, if there were some other cause for which the carrier was not to blame, it was incumbent on it to disclose that cause. When it fails to reveal that cause, the inference is almost unavoidable that the disclosure would not be helpful. Ib.

3. **Actionable Damages.** Where the petition does not declare upon a failure to reach a certain market but upon the loss sustained by reason of the difference in flesh and condition of the animals on arrival from that in which they would have been had no delay occurred, the measure of damages is the difference in the market value of the animals in one condition from their market value in the other. This is true, as to the loss on account of the condition of the animals, whether they are shipped to market or held for some other purpose. Ib.

4. **Question for Jury.** In this case whether the animals were diminished in value by the delay and if so, the amount of the loss sustained thereby, are questions for the jury, not for the appellate court. Ib.

CARRIERS OF PASSENGERS.

1. **Yards: Turntable: Pit.** C shipped a carload of mules over a carrier's road to St. Louis to market. There was a transfer point where the car would be put into a St. Louis train. They arrived there late in the afternoon, when he learned the other train was late. His car was set on a side track and he was informed by the conductor that the caboose in which he was to ride would not stop at the station but would have to be taken in the yards about where the car was. He went to the station and made inquiry about the train and was informed from time to time of its getting later and later. Finally near twelve o'clock at night he went with the crew which was to take the incoming train, to a restaurant which was used by the carrier as a shelter, some distance from the station proper, and there they waited until near one o'clock when the crew left to make up a train. C followed them over a path across the railroad yards towards where the caboose was to be. He presently fell into an unguarded turntable pit dug into the path, and was injured. The carrier was held liable in damages. Chorn v. Missouri, etc. Ry. Co., 518.

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CARRIERS OF PASSENGERS—Continued.

2. **Side Track: Caboose: Trespasser.** A carrier left a car of live stock on a side track in the railroad yards at a transfer point, in order that an incoming train might carry it on to destination. The shipper accompanied them and he was told by the conductor that the caboose in which he was to ride would not stop at the station, but would start from up in the yards. *Held*, that the shipper was not a trespasser in going along a path through the yards after night in order to reach the caboose. Ib.

3. **Directions of Conductor: Shipper.** A shipper of live stock has a right to rely upon the directions of the conductor as to where the caboose in which he is to ride will start from. Ib.

4. **Stock Pass: Statute: Conditions.** The statute requires carriers to give shippers of live stock a pass that they may accompany it, on condition that the shipper cares for the stock and releases the carrier from such care. The carrier has no right to impose any other conditions on the shipper by reservations written or printed in the pass, and such reservations are without force. Ib.

5. **Negligence: Contributory Negligence: Contract.** A shipper is always held to responsibility for his contributory negligence, and a carrier will not be permitted to contract against his own negligence. Ib.

CERTIORARI.

1. **When Available: Other Remedy.** *Certiorari* is allowed only when an appeal, a writ of error, or other available mode of review is not afforded. State ex rel. v. Circuit Court, 29.

2. **Appellate Practice: Appealable Orders.** Where a motion, under Sec. 7573, R. S. 1909, for rule and attachment to compel a justice of the peace to allow an appeal and return his proceedings in an action together with the papers required to be returned by him, is denied by the circuit court, the ruling is reviewable by appeal or writ of error, and hence *certiorari* does not lie to review the ruling, and this is true although no formal judgment was entered, since, on a proper motion, a formal judgment could have been entered, from which an appeal or writ of error could have been prosecuted. Ib.

3. **Necessity of Final Judgment.** *Certiorari* reaches only to cases in which there are final judgments or orders. Ib.

CHANGE OF VENUE.

Criticism in Presence of Jury. It is prejudicial error for a trial court in sustaining a motion for a change of venue to a judge to be called in, to make an address in criticism of the practice, in the hearing of the jury, wherein the motive of the applicant is attacked. State v. Doerries, 324.

CHECKS. **See Banks and Banking.**

CHILDREN. **See Divorce; Negligence; Physicians and Surgeons.**

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CITY ORDINANCES. See Personal Injuries.

Exclusion from Evidence: Proximate Cause. An ordinance of the city prohibiting horses from running at large is not available as a defense in the case stated. Such ordinances are not enacted for the benefit of railroads, and their violations are not the proximate cause of the injury. And the exclusion of such an ordinance was not error, since there was a duty incumbent on those operating the car, regardless of any ordinance. Windle v. Southwest, etc. Co., 596.

CONSPIRACY. See Life Insurance.

CONTRACTS. See Accident Insurance; Carriers of Passengers; Corporations; Master and Servant; Physicians and Surgeons; Principal and Surety; Trusts.

1. **Breach: Damages: Duty to Minimize.** One injured by the breach of a contract must make a reasonable effort to render the injury as light as possible, and if he knows of the failure or neglect of the obligor to do that which he has agreed to do, within ample time to do it himself, and fails to do it, he cannot hold the obligor for loss resulting from such neglect; but where the obligor merely postpones performance and leads the obligee to believe that he will perform, the latter is not required to take steps to minimize the damages until the contract is abandoned by the obligor. Cronan v. Stutsman, 46.

2. **Same.** In an action for damages for the breach of a contract to float logs, where defendant kept putting off performance until the logs had rotted, saying there was not enough water to float them, plaintiff could not be limited to nominal damages, on the ground that the damage was due to his own failure to float the logs, since defendant's conduct in postponing performance was sufficient to warrant a finding that plaintiff had been led thereby into the belief that defendant intended to perform, and it did not become his duty to float the logs himself in order to minimize the damages, until he acquired knowledge that defendant had abandoned the contract. Ib.

3. **Damages: Sufficiency of Evidence: Verdict for Less Amount Than Damages Proved.** In an action for the breach of a contract to float logs, plaintiff's claim for damages being that the logs had rotted as a result of defendant's delay, proof that the logs were a total loss and what their market value was was sufficient to establish the damages sustained, and the fact that the jury returned a verdict for a smaller amount than such evidence proved the market value to be is immaterial, so far as defendant is concerned. Ib.

4. **Action for Breach: Instructions.** In an action for damages for the breach of a contract to float logs, *held* that plaintiff's instructions were substantially correct. Ib.

5. **Evidence: Admissibility.** In an action for damages for the breach of a contract to float logs, *held* that the court did not err in ruling on the admissibility of evidence. Ib.

6. **Offer of Terms: Acceptance.** Where one party offers to furnish coal at a certain price and under one general contract, the offer, to become binding, must be accepted within a reasonable time and the vendor notified thereof. If this is not done,

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there is no contract and vendor is at liberty to withdraw offer. Serat v. Feagans, 506.

7. **Construction of: Court or Jury.** The construction to be placed on undisputed written correspondence is usually for the court and not the jury. This may not be a universal proposition since there may be cases in which on account of ambiguity in the language used, it should be left to the jury to say whether a reasonable man would be justified in treating it as a contract. But, even if the writing be ambiguous, when the admitted facts show that both parties treated it as not constituting a contract, the court is justified in construing it the same way. Ib.

8. **Question for Jury.** Where contract rests, partly in writing and partly in parol, and the parol portion is disputed, court must submit question of contract to jury. Ib.

9. **Establishment of.** Where defendant claims that a contract was created partly by letter and partly by a telephone conversation which is denied, it is incumbent on the defendant to show what was said in such telephone conversation, not merely his conclusion thereon. Nor will vague and uncertain testimony thereon be sufficient, if its purpose and effect be in conflict with the undisputed course of dealing between the parties. Ib.

10. **Rescission: Statute Quo.** Although plaintiff, after trading for and receiving the land, placed a mortgage thereon, yet as the evidence shows this was for the sole benefit of defendants and the money was used entirely to pay their debts, this would not preclude him from rescinding. The defendants were about to put the mortgage on it themselves but it was agreed that plaintiff should give the mortgage after he got the land rather than take it subject to the mortgage. As plaintiff's name was on the note he was the only person not placed in *statu quo* by the rescission, but of this defendants cannot complain. Manning v. McClure, 533.

11. **Tender.** Where plaintiff rescinded promptly and was anxious that defendant take the land back and offered to deed it to them, but was told by them they would not take it but would hold him to the trade, it was not necessary for him to go to the expense of executing a deed and make a formal tender of it before bringing suit. Ib.

12. **Sale of Real Estate: Foreclosure.** In contracts of sale of real estate by title bond a decree for the contract price and for foreclosure may be had. Wolf Co. v. Hermann Sav. Bank, 549.

13. **Should Plead as Modified.** Where an original contract is modified by a subsequent agreement, the plaintiff should declare on the contract as modified and not on the original contract. McCormick v. Obanion, 606.

14. **Time as of the Essence of.** Plaintiff, a foreign corporation, contracted with the defendants for a carload of onion sets at a stated price: "F. O. B. Jefferson Park, Ill. . . . for shipment *about not later* than Feb. 10, 1911. . . . If taken by December 20, five cents less per bushel. . . . If after February 10, five cents more per bushel." On January 19, 1911, defendants wrote plaintiff that they canceled the contract.

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Defendants refused to agree to cancellation. Several letters were exchanged, silent as to time of shipment. On February 10, 1911, plaintiffs loaded sets on car at Jefferson Park, Illinois, February 17, the car reached its destination. Defendant refused to accept it. Plaintiff sold sets to another party and sued for the difference between the contract price and the amount received from the sale to the third party. *Held*, that time was not of the essence of the contract as to the defendants. Kirkeby, etc. Co. v. White, 626.

15. **Construction of: Intent of Parties.** In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if time appears from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be *held* to be conditions precedent. Ib.

16. **Terms Construed by Parties to.** Where parties to a contract have given its terms a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. Ib.

17. **Breach of.** When a purchaser breaches a contract and refuses to accept the chattels sued for, the seller may treat the sale as ended by the purchaser's default, and need not make any delivery or tender of the articles sold. Ib.

18. **Same: Remedies.** The seller has two remedies: (a) He may dispose of the property for the purchaser's account, protecting, as far as possible, the purchaser's interests and obtaining the best price. (b) The seller may keep or dispose of the goods as his own; and his damages would be the difference between the contract price and the market value. Ib.

19. **Same: Liquidated Damages.** Where a stock of goods amounted to nine thousand dollars and the same was locked up for inventory for five days at a season of the year when trade is best, the sum of three hundred dollars is not an unreasonable amount for a breach of the contract of sale. Dyer v. Cowden, 649.

20. **Forfeiture Stipulations: Construction of.** In construing forfeiture stipulations in a contract, the court is guided by the subject-matter and the intention of the parties and scrutinizes the terms and conditions with which the forfeiture stipulation is associated. Nichols, etc. Co. v. Beyer, 686.

21. **To Compensate or Deter a Breach.** And the entire contract is examined and the surrounding circumstances of the particular case are considered, to determine whether the sum was inserted after an endeavor on the part of the contracting parties to fix the compensation in case of a breach or whether it was intended merely to deter a breach. Ib.

22. **Courts Favor Penalty Construction.** In ordinary contracts the aggrieved party should recover no more than the amount of loss that he has suffered, hence the courts favor construing forfeiture stipulations to be penalties rather than liquidated damages. Ib.

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CONTRACTS—Continued.

23. **Liquidated Damages.** But when damages are to be sustained by the breach of a single stipulation and these damages are uncertain in amount and not readily susceptible of proof under the rules of evidence, if the parties have agreed upon a sum as the measure of compensation for such breach and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. Ib.

24. **Must be Reasonable.** In a contract of sale involving $3200, where only eleven days elapsed between the time of the acceptance of the contract and its breach, where nothing appears to have been done to have changed the status of the parties or the property during that time, *held*, it would be unreasonable to presume that the plaintiff suffered a loss of $480 and such sum would be unreasonable. The amount was an arbitrary sum inserted in the contract for the purpose of deterring a breach of said contract rather than compensating for a single breach. Ib.

25. **Parol Evidence: Fraud.** The rule that the terms of a written contract cannot be varied by oral evidence does not prevent one from showing that the sale evidenced by the contract was induced by fraud. Ib.

26. **Fraudulent Inducement: Inquiry.** Where a written contract of sale of personal property recites that all conditions and representations are embodied in the paper, it will not prevent parol evidence showing fraudulent inducement to the sale. One cannot make a binding contract that his fraud cannot be inquired into. Tiffany v. Times, etc. Co., 729.

CONSTITUTIONAL QUESTION.

Elimination: Appellate Practice. Where the Supreme Court transfers a case appealed to it to one of the courts of appeals, on the ground it has no jurisdiction, constitutional questions sought to be raised are eliminated. Scientific American Club v. Horchitz, 35.

CONTRIBUTORY NEGLIGENCE. See **Carriers of Passengers; Defense; Landlord and Tenant; Negligence.**

CORPORATIONS.

1. **Principal and Agent: Contracts.** A corporation is not responsible for contracts entered into, before it came into existence, by promoters assuming to bind the company in advance; no principal of the law of agency being applicable to a case of this kind, as agency implies the existence of a principal. Van Noy v. Central, etc. Ins. Co., 287.

2. **Contracts: Promoters.** When a corporation becomes a legal entity, the corporation has the option of adopting or repudiating contracts for its benefit made by its promoters, and the exercise of such option may be manifested, as well, by acceptance and retention of the benefits of such contracts, as by an express agreement. Ib.

3. **Same.** Under Sec. 7001, R. S. 1909, a corporation becomes a corporate entity for the purpose of entering into contracts when it receives its certificate of incorporation;

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CORPORATIONS—Continued.

and in accepting the benefits of the contracts of its promoters, it adopted those contracts as its own, and takes them with all their burdens and infirmities. Van Noy v. Central, etc. Ins. Co., 287.

4. **Same: Readjustment Contract: Scope of Authority.** When an officer of a corporation is given authority to enter into a new contract in the nature of a readjustment and compromise of the old, the acts of that officer performed within the apparent scope of such authority binds the corporation, though they exceeded the limits of the authority intended to be conferred. Ib.

5. **Foreign Corporations: Interstate Commerce.** Plaintiff, a foreign corporation, was engaged in interstate commerce and was therefore not amenable to Rev. Stat. 1909, sec. 3039. Kirkeby, etc. Co. v. White, 626.

6. **Officer of: Acting in Official or Personal Capacity.** A president of a corporation engaged with plaintiff in selling land cannot, by a mere secret, unrevealed, intangible thought in his own mind, change his efforts from an official to an individual capacity so as to prevent it being the act of the corporation. Weidemeyer v. Woodrum, 716.

7. **Right to a Judgment.** Where one of the links in plaintiff's chain of facts essential to recovery is in dispute, the appellate court cannot reverse the case and order judgment entered in plaintiff's favor but must remand it for submission to another jury. Ib.

COSTS. See **Offer of Judgment.**

COURTS.

Misconduct of Counsel: Impassioned and Extrinsic Eloquence. It is the duty of the court to keep impassioned oratory within the limits of the record and not to allow a party to be injured in his rights by his adversary's extrinsic and passionate eloquence. Haake v. Dulle Milling Co., 177.

CRIMES AND PUNISHMENTS.

1. **Justices of the Peace: Intoxication.** The defendant, a justice of the peace, was tried and convicted under Sec. 10203, R. S. 1909, which provides a punishment for a public officer, who becomes so intoxicated that he is incapacitated to perform any official act at the time and in the manner required of him in the discharge of the duties of his office. It is *held* the evidence shows beyond question that the defendant was not so disabled at the time charged and the trial judge erred in not peremptorily instructing the jury to return a verdict for the defendant. State v. White, 249.

2. **Same.** It is not a crime for an officer to use intoxicating liquors, but it is a crime for him to be intoxicated, while in the performance of any official duty, or to be incapacitated by intoxication for the discharge of any official duty at a time, and in a manner, required of him by law. Ib.

3. **Same: Incapacitated.** The term "incapacitated," as used in the statute, means the inability on account of intoxication, properly, to perform an official act when it should be performed. Ib.

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CRIMINAL SLANDER.

1. **Gist of Action: Intent.** The gist of the action of criminal slander is the intention of the defendant in uttering the words. State v. White, 345.

2. **Accusing Female of Adultery: Intent: Instructions.** In order to constitute an offense under Sec. 4817, R. S. 1909, providing that every person falsely or maliciously charging or accusing any female of adultery or whoredom, by falsely speaking concerning her in the presence of others any false words imputing any such offense, shall be guilty of a misdemeanor, the words spoken must impute lack of chastity, and if it appears from the circumstances under which they were uttered that they were not intended or to be understood as imputing lack of chastity, but were intended and to be understood as terms of abuse or vituperation, the uttering of them does not constitute the offense; and hence, in a prosecution under this section, where the evidence tended strongly to show that the words uttered by defendant were used as terms of abuse, it was reversible error to refuse an instruction requested by defendant which declared the law as above set out. Ib.

CUSTOM. See **Banks and Banking.**

DAMAGES. See **Appellate Practice; Assault and Battery; Carriers of Goods; Carriers of Live Stock; Carriers of Passengers; Landlord and Tenant: New Trial; Personal Injuries; Station.**

1. **Nominal Damages.** One who proves he has been damaged, but fails to prove the amount thereof, can recover only nominal damages. Cronan v. Stutsman, 46.

2. **Special Damages: Personal Injuries: Pleading: Sufficiency of Allegations.** A petition, in an action for personal injuries, alleging that " . . . her nervous system disordered, shocked and also greatly injured internally," sufficiently set out a claim for internal injuries, and hence proof of injury to the uterus was admissible. Haywood v. Kuhn, 56.

3. **Measure of Damages: Instructions.** An instruction on the measure of damages, in an action for personal injuries, that "if the jury find a verdict for plaintiff, you are, in estimating her damages, to consider any change in her physical condition which you may believe from the evidence resulted from the injury to her; the physical or mental anguish, if any, suffered by her on account of her injuries at the time of and since such injuries, as shown by the evidence, and such damages, if any, as you may from the evidence find it is reasonably certain she will suffer in the future therefrom; and you will find a verdict for such sum as in your judgment will under all the evidence reasonably compensate her for such injuries, including compensation for such sums of money, if any, as the evidence shows she herself has heretofore paid out for medicines, nursing and medical treatment, but not including any amount not already actually paid by her" sufficiently defines the measure of damages. Ib.

4. **Excessive Verdict: Remittitur.** Where the plaintiff's injury in a collision with a street car is confined principally to his foot and the injury to that consists of a fractured bone at the instep, with torn ligaments, leaving the instep slightly enlarged and somewhat less elastic, but with full

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DAMAGES—Continued.

capacity to walk, and he resumed his work within three months, it was *held* that a verdict for $5000 was excessive, and a remittitur was required. Harris v. Met., etc. Co., 336.

5. **Measure of: Breach of Warranty.** The measure of damages for the breach of such a covenant is the purchase price of said part with interest from the date of the deed. Jeffords v. Dreisbach, 577.

6. **Costs and Expenses of Litigation: Notice.** A covenantor will not be liable on breach of his warranty for the costs and attorney's fees in a litigation between the covenantee and a third party, unless the covenantee had given the covenantor explicit and proper notice of the alleged default in the title which the deed purports to convey. Ib.

7. **Excessive Verdict.** Where an employee, killed by the negligence of a bridge company, was divorced from his wife, leaving an only child, who lived with the mother, has not abandoned the child, though not then supporting it, a verdict of $2500 in the child's favor was *held* not to be excessive. Harris v. McClintic, etc. Co., 724.

8. **Remittitur: Prejudice of Jury.** Where a verdict was for $5000 and the court ordered a remittitur of $2500, it does not follow that a new trial should be had on the ground that the verdict showed prejudice on the part of the jury. Ib.

DEATH. See Station.

DEFENSE.

Contributory Negligence. The plaintiffs were not guilty of contributory negligence as a matter of law in permitting the horse to break loose in the manner shown in the evidence and to continue on down the street loose, but closely watched by the plaintiff and his employees. Windle v. Southwest, etc. Co., 596.

DIVORCE.

1. **Desertion: Efforts at Reconciliation.** Where a husband abandons his wife without cause, it is necessary for him to show, in order to entitle him to a divorce on the ground that the wife was guilty of desertion, under Sec. 2370, R. S. 1909, in refusing to return to and live with him, that he offered in good faith to effect a reconciliation and to return to her or take her back, that she refused his offer, and that such refusal continued for the statutory period of one year. Creasey v. Creasey, 68.

2. **Same.** Where a husband abandons his wife without cause, he will not be heard to charge her with desertion on the theory she refuses to return to him, unless he seeks a reconciliation and offers to return to her or take her back; and such offer must be made with the bona fide intention of bringing about a reconciliation and not merely as a device to defeat her in divorce or maintenance litigation. Ib.

3. **Same: Effect of Acquiescence.** In order to warrant a divorce on the ground of desertion, under Sec. 2370, R. S. 1909, the defendant must have been absent from the

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DIVORCE—Continued.

plaintiff without the consent of the latter, for the full period of one year. Ib.

4. **Same: Efforts at Reconciliation: Refusal: Sufficiency of Evidence.** In an action by a husband for divorce, prosecuted on the theory that, after he had wrongfully abandoned his wife, the latter refused an offer he made to become reconciled and live together thereafter, evidence *held* to show that the wife did not refuse a proper offer of reconciliaton a year before the suit was brought, and that, therefore, she was not guilty of desertion, under Sec. 2370, R. S. 1909. Ib.

5. **Same: Effect of Insincere Efforts.** Where a husband abandoned his wife without cause, the fact that he made insincere offers to effect a reconciliation must be considered in weighing the integrity of subsequent offers made within a year after the abandonment, but does not conclude the matter, since, under the law, the "door of repentance and return" must be kept open to him for a year. Ib.

6. **Same: Bona Fides of Efforts.** An offer of reconciliation made by a husband who had abandoned his wife is not to be condemned because made by letters; and the fact that he kept copies of such letters would not conclusively establish that he was insincere in making the offer, although it was a circumstance pointing in that direction. Ib.

7. **Same.** Where a husband, after abandoning his wife without a cause, made a sincere offer to take her back, intending, if she accepted, to perform his marital obligations, the fact that the cause moving him to make the offer was a desire to avoid the rendition of a judgment for separate maintenance for the wife in a suit then pending would not diminish the legal effect of his offer. Ib.

8. **Same.** Where a husband, after abandoning his wife without cause, made numerous efforts to effect a reconciliation, which were rejected by the wife, he was justified in requiring, as a condition of his acceptance of an offer by her to return to him, made the night before the day a suit for separate maintenance brought by her was set for trial, that she dismiss said suit, and his previous offers to take her back should not be stamped with insincerity because of this insistence. Ib.

9. **Same: Efforts at Reconciliation: Effect of Rejection.** Where a husband abandons his wife without cause, his genuine offer to return and renew cohabitation, made before a year elapses, will break the desertion and will prevent the wife's obtaining a divorce on the ground of desertion, under Sec. 2370, R. S. 1909. Ib.

10. **Same: Bona Fides of Efforts.** Where a wife, whose husband abandoned her, instituted suit for separate maintenance, alleged offers in her motions for attorney's fees, that she was at all times ready to resume marital relations, not being made as offers but as excuses for demanding money, should be disregarded in determining whether or not the husband had made a genuine effort to effect a reconciliation, so as to defeat the wife's action for divorce on the ground of desertion. Ib.

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DIVORCE—Continued.

11. **Same: Effect of Acquiescence.** A husband's wrongful abandonment of his wife does not constitute desertion, under Sec. 2370, R. S. 1909, if, within one year thereafter, she showed by her words or conduct that she acquiesced in the separation. Creasey v. Creasey, 68.

12. **Same: Efforts at Reconciliation: Effect of Rejection.** Where, prior to a husband's wrongful abandonment of his wife, he had not been guilty of conduct justifying a divorce, the wife could not refuse to accept genuine offers made by him to effect a reconciliation because of his conduct prior to the separation, and she could not, by remaining away from him, as a consequence of such refusal, create a right to be divorced on the ground of statutory desertion. Ib.

13. **Same.** In an action for divorce, *held* that the evidence showed that the husband, within one year after he had wrongfully abandoned his wife, had made a genuine offer to effect a reconciliation and renew cohabitation with his wife, and that she refused his offer, and hence it is *held* that the wife was not entitled to a divorce on the ground of desertion, under Sec. 2370, R. S. 1909. Ib.

14. **Same: Effect of Acquiescence.** In an action for divorce, *held* that the evidence showed that, within one year after her husband had wrongfully abandoned her, the wife showed by her conduct that she acquiesced in the separation, and hence it is *held* that she was not entitled to a divorce on the ground of desertion, under Sec. 2370, R. S. 1909. Ib.

15. **Evidence.** In this case, however, the evidence presented is reviewed and *held* sufficient to justify a divorce to plaintiff and the dismissal of defendant's cross-bill. Hull v. Hull, 220.

16. **Custody of Children: Modification of Judgment at Subsequent Term: Procedure.** Under Sec. 2381, R. S. 1909, authorizing the court granting a divorce to review, at any time, any order or judgment awarding alimony or the custody of the children, the court granting a divorce retains jurisdiction as to the modification of a judgment touching the custody of the children, and this matter may be brought to the attention of such court by a motion in the original cause, at a subsequent term; such proceeding being a continuation of the original jurisdiction of the court touching the custody of the children. Wald v. Wald, 377.

17. **Wards of Court: Permitting Removal Into Another Jurisdiction.** Where the custody of a child is awarded in divorce proceedings, it becomes a ward of the court, and the court should not permit it to be removed into another jurisdiction, unless its best interests require it. Ib.

18. **Same: Modification of Judgment Awarding Custody at Subsequent Term: Procedure.** Where a wife obtained a divorce and was awarded the custody of a child born of the marriage, a privilege given the husband by the decree to take the child out two days each week prima facie established a right in him to see it within the territorial jurisdiction of the court, and it was error for the court to sustain an objection to the introduction of evidence under a motion filed by him at a subsequent term, praying for a modifica-

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tion of the decree so as to award the custody of the child to him on the ground the wife was about to remarry and take it into another jurisdiction, since he was entitled to a hearing on the question of whether its best interests did not require that it be not removed from the jurisdiction of the court. Ib.

19. **Trivial Grounds: Necessity of Coming into Court with "Clean Hands."** When it becomes apparent that the true aims of the union of a husband and wife can no longer be achieved by continuing the marital tie, the best interests of society does not demand that it be preserved by mere force of law; but it is the duty of the courts to see that it is not dissolved on slight testimony, for light or trivial causes, or when neither party comes into court with "clean hands." Barth v. Barth, 423.

20. **Both Parties at Fault: "Injured Party."** Where both parties to a divorce suit are at fault, the court will not attempt to find which is the more at fault, but will award neither a divorce. Ib.

21. **Same: Sufficiency of Evidence.** In an action by a husband for divorce on the ground of indignities rendering his condition intolerable, evidence *held* to show that defendant had been guilty of such indignities as would warrant the granting of a divorce to plaintiff; evidence further *held*, however, to show that plaintiff had been guilty of indignities toward defendant, and, therefore, that he was not the "injured party," within Sec. 2370, R. S. 1909; and hence it is *held* that he was not entitled to a divorce. Ib.

22. **Modification of Decree: Support of Child.** In June, 1907, plaintiff herein obtained a decree of divorce from defendant and, in the decree, alimony in gross was awarded, which was paid. The care and custody of a son of the marriage, then aged nine, was also awarded plaintiff, but no decree, order or judgment was entered with reference to the maintenance of the child. In June, 1912, plaintiff filed a motion asking that defendant be required, under order of court, to pay a sufficient sum to educate and maintain the child. The trial court sustained the motion, and allowed plaintiff the sum of five hundred dollars per annum for the support and maintenance of the child. The defendant appeals, contending, that since the trial court failed in the original decree to provide for the maintenance of the child, it had no jurisdiction to modify or alter the decree so as to provide for such maintenance. *Held*, that it was within the province of the trial court to make the order. Robinson v. Robinson, 639.

23. **Decree: Custody of Children: Right of Access.** The right of custody of children granted by a decree does not deprive the other party of the right to see the children unless there is an express provision to the contrary. And even the guilty party is allowed this privilege though in rare cases it has been refused where, on account of the depraved character of the party, it is deemed best. Phipps v. Phipps, 697.

24. **Modification.** A judgment for divorce, as regards alimony and custody and support of children, remains open for variation from time to time as the changed circumstances of the parties may require. But the custody cannot be changed except after

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DIVORCE—Continued.

notice and hearing and upon new facts or a change in the circumstances or character of the parties justifying a change. Phipps v. Phipps, 697.

25. **Slight Change Sufficient.** Where the application is in order that the mother may visit the child or have it visit her, the court, without deciding whether the order made is in reality a change of custody to the extent of the visit, will lay hold of slight changes to justify the order. Ib.

26. **Same.** Even though the mother has been indiscreet, yet, if the evidence shows that since the decree she has married a good man and is living the right kind of life, the court will deem this a sufficient change in her circumstances and character to justify the order made by which the child may be allowed to visit her, especially where for a year after the divorce the husband allowed her to keep the child, and there is nothing to show that the modification of the decree would in any way injure the child. Ib.

27. **Same.** If the circumstances should change requiring the modification to be itself modified in the future, either parent can apply to the trial court for such modification, since the divorce suit on this phase remains open till the child becomes of age. Ib.

DOMICILE. See **Attachment.**

DOWER. See **Widow.**

Timber Land: Waste: Restraint. A widow with a dower interest in lands the value of which consists principally in growing timber, may maintain a bill to restrain one in possession from wilfully committing waste by destroying the timber. Whitworth v. Barnes, 269.

EQUITY. See **Trusts.**

1. **Trust Funds: Husband and Wife: Incumbrances.** This is an action in equity brought by the plaintiff to establish a resulting trust in land belonging to her husband at the time of his death. The plaintiff, at the time of her marriage, was a widow with three children, the husband was a widower with four children. The husband took $500 of plaintiff's money to pay for a new house, and $400 to pay off the incumbrances on the farm. The trial court found each of these advancements created a trust by operation of law. It is *held* that the court erred in declaring a trust for the $500 used to pay for the house, but a trust was properly declared for the $400 with which the husband paid off the incumbrances on the land. Graham v. Wilson, 185.

2. **Trust Fund: Resulting Trust.** When the husband without the consent of his wife in writing appropriates her separate estate and uses it for the betterment of his own land, he commits a wrong against his wife, for which the law affords her redress and treats him as a trustee *ex maleficio*. She can follow that money and have it charged, in equity, as a lien upon the land. Thus she becomes the beneficiary of an implied or resulting trust by operation of law, and not by contract. Ib.

3. **Weight of Testimony.** Appellate court can, in an equity case, weigh the testimony for itself and is not bound

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EQUITY—Continued.

by the findings of the trial court, yet the latter's better opportunity to weigh the testimony is recognized and where it is conflicting and apparently of equal force and plausibility the trial court's judgment therein will be deferred to, if there is sufficient evidence upon which to base it. Hull v. Hull, 220.

4. **Trust Fund: Creditors of Beneficiaries: Husband and Wife.** Plaintiff sued in equity, to obtain a decree declaring a trust in his favor, and to compel the trustee to pay to him the sum due him out of the trust fund. Defendant James Welch sold a farm and his wife joined in the deed. The proceeds of the sale were placed in the hands of the defendant Scott as trustee, the terms of the trust being fully expressed in writing. The trustee, after paying all debts, was to turn over a certain amount of money for their maintenance. Welch, several years prior to the commencement of this action, notified the merchants that he would not be responsible for her debts. Plaintiff continued to sell goods to Mrs. Welch, and one month after this trust agreement was entered into, brought suit against both the husband and wife and obtained judgment against the wife only. Plaintiff now seeks to recover the amount of the judgment from the trust fund. *Held*, that the trust deed created a trust in favor of plaintiff, a creditor of Mrs. Welch, which he is entitled to have enforced in an equitable action. Taylor v. Welch, 223.

5. **Same: Trusts, Executed or Executory: Written and Parol.** To create either an executed or an executory trust as to personal property, it is not essential that the trust be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trust as is the case with an express trust relating to land. A trust as to personalty may be proved parol. Ib.

6. **Same: Trust Agreements: Retention and Control: Beneficiaries.** When parties by a trust agreement make themselves and their creditors the beneficiaries, and as such, they retain an equitable estate in the fund, such a retention is not inconsistent with the creation of a trust. Ib.

7. **Purchase Price: Personal Property.** When the purchase price of personal property is unpaid the intention of the parties to the contract of sale will be given controlling effect unless the property be of such nature that necessarily it becomes incorporated into the realty by the act and manner of annexation. Wolf Co. v. Hermann Savings Bank, 549.

8. **Conditional Sale: Prior Mortgage.** A conditional sale of machinery put into a plant covered by a prior mortgage, will be enforced in the face of the opposition of the mortgagee where such machinery may be removed without substantial injury to the freehold, or to the security the mortgagee had at the time such addition was made to the plant. Ib.

9. **Same: Impairment of Security.** Conditional sales are given full effect as against the interest of prior mortgagees where by so doing the security of the mortgage is not diminished. Ib.

ESTOPPEL. See Banks and Banking; Instructions; Life Insurance.

Laches: Burden of Proof. One setting up estoppel or laches has the burden of making out the facts upon which such defense rests. Locke v. Bowman, 121.

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EVIDENCE. See Accident Insurance; Appellate Practice; Bills of Exceptions; Carriers of Live Stock; City Ordinances; Contracts; Gifts; Master and Servant; Negligence; Real Estate; Sales; Witnesses.

1. Impeaching Evidence: Relevancy: Admissions. In an action for personal injuries, a witness for defendant, testifying to a conversation between plaintiff and himself concerning the case, said that plaintiff remarked: "You know as well as I do that Ott (the defendant) is a good man and a church member and has lots of friends, and if you prove my reputation it will be a job for me to gain this. You know that as well as I do." *Held*, that the testimony was relevant to the issues as giving plaintiff's own statements concerning his reputation. Kiel v. Ott, 40.

2. Evidence: Value of Property: Witness Not Shown to be Qualified. It was not reversible error to permit plaintiff to testify as to the value of a farm even though he had not shown himself qualified, in view of the fact that the value was proved by other qualified witnesses and no testimony as to value was offered by defendant, and it was not material to plaintiff's right to recover whether the farm was valued at plaintiff's estimate or at that placed on it by the witnesses who were qualified. Manning v. McClure, 533.

3. Demurrer to. Defendant waives his demurrer to the evidence by introducing his own testimony, instead of standing on the demurrer, unless the demurrer is again presented at the close of all the evidence. Jeffords v. Dreisbach, 577.

4. Statements: Hearsay. Evidence given by a witness that another person, not the plaintiff, had said to the witness, when the latter asked how the accident occurred, "I hallowed to Lon that the cage was gone" was, under the circumstances under which it was given, mere hearsay. Even though such person had testified that he did not hallow to the plaintiff, this did not make the statement competent since no foundation was laid for contradicting the one said to have made such statement. Nor was the testimony sought to be elicited for this purpose. Bowman v. Marceline, etc. Co., 703.

5. Excluding Answer: No Proffer Nor Showing Made. The exclusion of an answer to a question will not work a reversal of a case where there is nothing to show what the answer, if it had been admitted, would have been. It is the duty of the party, alleging error because of excluded evidence, to indicate, by an offer to the trial court, what the evidence is. Ib.

6. Opinion of Witness. A witness, after testifying that defendant's engineer once told him he had nervous spells, further testified that he had known the engineer for twenty years and that his record as an engineer was good, and was then asked whether he considered the engineer "a good safe man." He had already testified to the experience, competency and sobriety of the engineer, and it was neither necessary nor the province of the witness to answer a question which, in the form it was asked, was really, "In your opinion is the engineer a man that would be negligent or careful on this occasion?" Ib.

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EXECUTIONS.

Attack: Sufficiency: Foreign Corporations: Right to Sue. If it were allowable (which it is not) for an execution defendant to attack the execution on the ground that the plaintiff is a foreign corporation, not authorized to do business in this State, the mere filing of an *ex parte* affidavit, not brought to the attention of the court, in support of the motion to quash the execution, setting out that the foreign corporation had not complied with the statute, would not establish the truth of the matter set up in the affidavit nor be sufficient to sustain the attack on the execution. Scientific American Club v. Horchitz, 35.

EXECUTORS AND ADMINISTRATORS. See Probate Courts.

EXEMPTIONS. See Life Insurance.

FIRE INSURANCE.

1. **Owner: Mortgage: Premium: Assignment.** An owner of personal property gave a mortgage on it to secure a debt. He then took out a policy of insurance, with a clause that "loss was payable to the mortgagee, as his interest might appear." The policy expired and the insurance company's agent solicited the owner to renew it. He replied that he wanted it but had not the money to pay the premium, and asked the agent to see the mortgagee and get him to pay it. The agent did so and the policy, worded like the other, was delivered to the mortgagee. The property was destroyed by fire and the owner and mortgagee joined as plaintiffs in an action thereon. While the action was pending, the mortgagee was paid his claim and he then assigned all his interest to plaintiff, who filed an amended petition dropping the mortgagee as a party. It was *held* that the owner could recover the amount of the policy. Gillespie v. St. Paul, etc. Co., 320.

2. **Pleading: Amendment: Practice.** In an action on a fire insurance policy with a clause "loss if any payable to mortgagee as his interest may appear," and the property is destroyed, and an action brought in joint names of the owner and mortgagee, and afterwards the mortgagee is paid his claim by the owner and assigns his interest to the owner, it is proper practice to then file an amended petition in the name of the owner alone. Ib.

3. **Bad Faith: Attorney's fees.** When bad faith in the defense is shown, it is proper to allow the plaintiff an attorney's fee. Ib.

FIXTURES.

1. **What are: Intention of Parties.** In determining what is a fixture, the intention of the parties is to be considered rather than a mere physical attachment to the realty. Houses, machinery etc., may be placed on land in a permanent manner and yet remain personalty as between the parties to the transaction and those claiming under them with notice, if the parties by agreement evidence the intention that such shall not become part of the realty. Muehling v. Magee, 675.

2. **Grantee's Knowledge as to Ownership: Injunction.** A suit by the grantee cannot be maintained to enjoin the removal of a boiler from the premises, when the grantee knew, prior to

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FIXTURES—Continued.

his purchase of the property, that his grantor did not own the boiler. Muehling v. Magee, 675.

3. **Severance: Deed Not Necessary.** A deed of severance is not necessary in order to sever a fixture, such as machinery, from the real estate and make the same personalty. Ib.

FOREIGN CORPORATIONS. See **Corporations; Executions; Res Adjudicata.**

Right to Sue: Affirmative Defense. The fact that the plaintiff in an action is a foreign corporation raises no presumption that it is not authorized to do business in this State, but that is an affirmative defense which, to be effective, must be made and sustained. Scientific American Club v. Horchitz, 35.

FRATERNAL BENEFICIARY ASSOCIATIONS.

1. **Affirmative Defense: Suicide.** The plaintiff seeks to recover on a death benefit certificate issued to her husband, who committed suicide. The certificate stated there could be no recovery, if suicide was committed within three years after it was issued. This defense being affirmatively pleaded, the trial court found for plaintiff, on the ground that the defendant failed to plead and prove all the elemental facts of a valid defense founded on an exemption peculiar to such an association. *Held*, that the death of the husband was self-inflicted is a fact established beyond dispute as are also the facts on which the right of defendant to interpose the defense of suicide is predicated, and plaintiff was therefore not entitled to recover. Newland v. Modern Woodmen of America, 311.

2. **Pleading: Proof of License to do Business.** To be entitled to the benefit of the liberal laws and rules of construction pertaining to death benefit certificates issued by fraternal beneficiary associations, it devolves on such associations to plead and prove not only that they possess the essential qualifications of such societies, as prescribed and defined in Sec. 7109, R. S. 1909, but also, when incorporated in another state, that they have been admitted to do business in the State in the manner provided in Sec. 7112, R. S. 1909. Ib.

3. **Same.** The certificate of incorporation or that of authority to do business in this State, are not conclusive of the character of the business done, but must be proven by facts tending to show that the association is conducted as one which our laws define to be a benevolent association. Ib.

FRAUD AND DECEIT. See **Attachments; Attorneys; Contracts; Life Insurance.**

1. **Debt Fraudulently Contracted: Actionable Fraud: Implied Misrepresentations.** In order for a debt to be fraudulently contracted on the part of the debtor, he must have been guilty of some material deceptive act, word or concealment, done or suffered by him with the intent to induce the opposite party to consent to the debt, and the latter must have relied upon such false acts or manifestations of the debtor and yielded his consent to the contract on the faith thereof. Matthews v. Eby, 134.

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FRAUD AND DECEIT—Continued.

2. **Representations: False and Fraudulent.** Representations made as positive statements of fact, by one of three owners of a tract of land, are not relieved of their false and fraudulent nature by the fact that the person making the representations had never seen the land and so informed plaintiff, because the former immediately referred the latter to one of the other landowners as one who had seen it and he, in the presence of the other, made similar representations. In such case the representations of one were those of all. And as plaintiff had no opportunity to see the land before the trade, he had a right to rely on the representations, since they were concerning physical facts, were not mere expressions of opinion and were reasonable on their face. Manning v. McClure, 533.

3. **Deception by: Question for Jury.** It is a question for the jury whether the defendant was deceived or not. If there is any evidence tending to show misrepresentations and that the defendant acted upon such misrepresentations in entering into the contract and not on his own judgment, the plaintiff's (seller's) knowledge and intention become material questions which should be left to the jury, and the court commits error in taking such a case from the jury. Dyer v. Cowden, 649.

4. **Motive and Intent.** Where actual fraud is charged, the question is largely one of motive and intent, and whether there is fraud or not is a question for the jury. Ib.

FRAUDULENT CONVEYANCES. See **Attachments; Personal Property.**

GIFTS.

1. **Intention: Delivery.** In order that there may be a valid gift of personal property, in addition to an intention to give, there must be an actual delivery. Citizens National Bank v. McKenna, 254.

2. **Gift: Inter Vivos and Causa Mortis: Evidence: Conjecture.** While evidence of a gift *inter vivos* need not be so conclusive as that of a gift *causa mortis*, yet it should be sufficiently definite and certain to place the transaction beyond mere conjecture. Mitchener v. Frazer, 265.

3. **Same: Case not fully developed: Remand.** Where a plaintiff fails to make out a satisfactory case but yet it appears probable that the issues have not been fully developed, the court may remand for a new trial instead of reversing outright. Ib.

GRANTOR AND GRANTEE.

Rights of. A grantee with notice has no greater rights than his grantor had. Muehling v. Magee, 675.

GUARDIAN AND WARD.

Testamentary Guardian: Failure to Give Bond: Failure to Give Statutory Notice: Jurisdiction to Appoint Statutory Guardian: Probate Courts. In view of the provisions of Sec. 424, R. S. 1909, fixing the amount of a curator's bond at double the value of the estate, the giving or tendering of a bond by a testamentary guardian of the person of an in-

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GUARDIAN AND WARD—Continued.

fant is not a condition precedent to his right to assume such guardianship, where the infant has no estate; but his notification of the probate court of his acceptance of the guardianship, within six months after the probate of the will, as provided by Sec. 409, R. S. 1909, is a condition precedent, and the failure to give such notice clothes the probate court with jurisdiction to appoint a statutory guardian, as authorized by the statute, and the fact that the testamentary guardian qualified as executor of the will and assumed the duties of guardian for some years would not dispense with the necessity of giving notice nor deprive the probate court of jurisdiction to appoint a statutory guardian. State ex rel. v. Holtcamp, 402.

HABEAS CORPUS. See Mandamus.

HUMANITARIAN DOCTRINE. See Negligence; Personal Injuries; Station; Street Railways.

Applicability of. The humanitarian doctrine assumes that the object in danger of being injured is capable of comprehending the danger and of intelligent action, hence of contributory negligence. The doctrine is not applicable to young children, persons *non compos mentis* or animals. Windle v. Southwest, etc. Co., 596.

HUSBAND AND WIFE. See Agency; Equity; Maintenance.

Agent: Loan: Gift. A wife's authority to her husband to act as her agent to loan the money on notes and to collect the loans, is not authority to make a gift of the money or the notes to their daughter. Mitchener v. Frazer, 265.

INDICTMENT.

Lost Record: Supplied Paper. If the record shows that there was no judgment or order supplying a lost indictment, it is error to allow a paper alleged to be a copy to be treated as a supplied paper. State v. Doerries, 324.

INFANTS. See Divorce.

INJUNCTION. See Dower; Widow.

1. Surface Water: Demurrer. Plaintiff sued the defendants for unlawfully and maliciously collecting surface water from their lands and precipitating it in a body on the land of the plaintiff and to enjoin them from doing so in the future. A permanent injunction was granted and damages awarded. *Held*, that the demurrer to the evidence was properly overruled and a proper judgment rendered. Weishar v. Sheridan, Admr., 181.

2. Dominant and Servient Proprietors. Surface water is a common enemy against which every landowner must protect himself and a servient proprietor has no right to require protection at the hand of the dominant proprietor, but the dominant proprietor has no right to collect the excess surface water and cast it in a body on the servient land. Ib.

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INSTRUCTIONS. See Carriers of Goods; Contracts; Damages; Landlord and Tenant; Master and Servant; Negligence; Personal Injuries; Real Estate Brokers; Station; Trial by Court.

1. **Covering Whole Case: Ignoring Theory of Either Side.** An instruction which is intended to cover the whole case should cover defendant's side of the case as well as plaintiff's. Thornton v. Mersereau, 1.

2. **Covering Whole Case: Ignoring Defense.** In an action for services rendered, where plaintiff offered evidence tending to prove an employment and the rendition of services thereunder and their value, while defendant offered evidence tending to prove that he and defendant were partners in the work, an instruction given for plaintiff, intended to cover the whole case, which authorized a recovery if the jury found that the parties entered into an agreement whereby plaintiff was to perform the services, that plaintiff performed them, and that they were of value, was erroneous for failing to cover the issue of whether or not the parties were partners. [REYNOLDS, P. J., dissents.] Ib.

3. **Form of Verdict: Several Counts Stating Same Cause of Action.** Where plaintiff states the same cause of action in different counts, the court should charge that, if the jury finds for him on one of the counts, it should find no damages, or, if it be proper to award nominal damages, merely nominal damages, on the other counts. Blackmer, etc. Co. v. Mobile, etc. Co., 22.

4. **Form of Verdict.** An instruction containing simply a form of verdict and nothing more, with no prefactory explanation showing in what event it is to be used, is likely to be misleading and work prejudice to the other side. Cies v. Gale, 282.

5. **Assuming Existence of Disputed Facts.** It is not error for an instruction to assume the truth of a proposition which is established by the undisputed testimony and appears not to be controverted, but an instruction which assumes the truth of a proposition is erroneous if there is a conflict in the evidence respecting it and the issue as a vital one. Warrington v. Bird, 385.

6. **Negligence: Action for Injuries: Assuming Ownership of Instrumentality.** In an action for injuries from an automobile, where the only issue was as to its ownership and control, and the evidence on that issue was conflicting, an instruction, declaring the rule of care with respect to the operation of automobiles in public streets and directing that if "the defendant or his agent, in operating said automobile . . . at the intersection of said streets, on the day alleged in plaintiff's petition, operated the said car without observing the highest degree of care," and collided with plaintiff's horse and buggy, plaintiff could recover, was erroneous, for the reason it assumes that defendant or his agent was operating the automobile. Ib.

7. **Common Error: Estoppel.** Where an instruction for plaintiff in an action for personal injury assumes negligence in the proprietors of a coal mine, and assumes the roof of the mine was not reasonably safe, it is error. But if defendant by its instruction also assumes these things, it cannot complain on appeal. Popineau v. Waverly, etc., Co., 547.

8. **Issues Submitted.** In an instruction purporting to cover the entire case it is not necessary to submit every disputed evi-

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INSTRUCTIONS—Continued.

dentiary fact arising in the case, even though the same be pleaded. It is only necessary to submit the essential facts warranting a recovery and not omit the essential facts which would defeat such recovery, and vice versa. Acme, etc. Co. v. Gasperson, 558.

9. **Harmless Error.** An instruction which is predicated on the facts with a direction to find for or against a party must recite all the controverted or disputed facts essential to a recovery. But where there is no dispute about the facts on a necessary issue or where one of the necessary issues is admitted by the adversary, it is not reversible error for the court to assume such fact. Murphy v. Southwest, etc. Co., 588.

10. **Assuming Facts in Instructions.** The capacity in which Coates was acting at the time of the assault being put in issue by the evidence, the trial court properly refused an instruction requested by the appellant which assumed that Coates was acting merely as a deputy sheriff and not within the scope of his authority as an employee of the appellant. Ib.

11. **One Instruction Covered by Another.** All instructions are to be construed together. *Held*, in this case, that an instruction embodying the expression "in accordance with the terms of their employment" sufficiently covered all conditions of employment and cures any error occasioned by the refusal of an instruction on one particular condition. Pile v. Allison, 636.

INSURANCE. **See Accident Insurance; Benefit Certificate.**

INTEREST. **See Appellate Practice; Judgments.**

Judgments: Special Taxbills: Charter of St. Louis. Under Secs. 7179, 7181, R. S. 1909, fixing six per cent as the legal rate of interest, and providing that judgments shall bear that rate of interest, but that judgments on contracts bearing more than six per cent interest shall bear the same rate of interest as fixed by the contracts, a judgment enforcing a special taxbill for street improvements made in the city of St. Louis draws interest at the rate of six per cent per annum, although the Charter of said city provides for eight per cent interest if default be made in the payment of a taxbill, inasmuch as the Charter provision is a provision for penal interest, and is not interest provided by contract, within section 7181. Granite, etc. Co. v. Parkview, etc. Co., 468.

INTERSTATE COMMERCE. **See Corporations.**

INTOXICATING LIQUORS. **See Crimes and Punishments.**

1. **Illegal Sales: Sufficiency of Record.** In a prosecution for the illegal sale of intoxicating liquor by a merchant, in violation of Sec. 11640, R. S. 1909, *held* that the record does not disclose any error or irregularity justifying a reversal of the judgment of conviction. State v. Cordia, 132.

2. **Illegal Sales: Sufficiency of Record.** In a prosecution for the illegal sale of intoxicating liquor by a merchant, in violation of Sec. 11640, R. S. 1909, *held* that the record does not disclose any error of irregularity justifying a reversal of the judgment of conviction. State v. Cordia, 133.

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JUDGMENTS. See Bill of Exceptions; Divorce; Interest; Justices of the Peace; Maintenance; Offer of Judgment.

1. Verdict. Judgment is not rendered until the verdict is received and recorded, and the judgment is based on the verdict *as recorded*. Hence judgment must follow recorded verdict and if that be ambiguous, the judgment cannot stand. Newton v. St. Louis, etc. Co., 199.

2. Satisfaction: Interest. Appellant had two judgments but was entitled to but one satisfaction, the judgments being for the same services. *Held*, that when appellant received satisfaction of one judgment in full with interest, the full amount received, including the interest, was properly credited on the other judgment, as of the date it was collected. Such credit should not be for the face of the judgment merely, since appellant would be no more entitled to receive interest twice for the same time than he would to collect the principal twice. Kansas City v. Forsee, 213.

JUDICIAL NOTICE. See Bills of Exceptions.

JURISDICTION. See Attachment.

Supreme Court. A case involving a Federal question, to-wit, a construction of the Constitution of the United States regulating commerce between States, is within the jurisdiction of the Supreme Court, and not the Court of Appeals. City of Eldorado Springs v. Highfill, 557.

JUSTICES OF THE PEACE. See Appellate Practice; Crimes and Punishment; Pleading.

1. Appeal to Circuit Court: Conclusiveness of Judgment on Surety. A surety on an appeal bond, on appeal to the circuit court from a judgment of a justice of the peace, is in privity with the judgment debtor, and the judgment is binding on both. Scientific American Club v. Horchitz, 35.

2. Action: Splitting Cause of Action: Attachment. Where the doubt owing a creditor was in excess of the jurisdiction of a justice of the peace, and, in order to give the justice a fictitious appearance of jurisdiction, he split his cause of action and brought two suits and sued out two writs of attachment in aid thereof, the levy under said writs amounted to a fraud in law. Matthews v. Eby, 134.

LACHES. See Estoppel; Life Insurance.

Constituent Elements. In order to defeat an action on the ground of laches, a showing of mere delay or death of a participant is not sufficient, but it must also appear that the other party was injured by the delay and that plaintiff had knowledge of the infringement of his rights and had an opportunity to establish them. Locke v. Bowman, 121.

LANDLORD AND TENANT. See Negligence.

1. Negligence: Injury to Tenant: Condition of Premises: Question for Jury. In an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, whether the premises were in the same condition at the time of the accident as when rented, *held* a question for the jury; *held, further,*

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LANDLORD AND TENANT—Continued.

that whether plaintiff assumed the risk of injury, by reason of the premises being, to her knowledge, in the same condition when they were rented as when she was injured, was also a question for the jury. Haywood v. Kuhn, 56.

2. **Contributory Negligence: Question for Jury.** In an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, whether plaintiff was guilty of contributory negligence, *held* a question for the jury. Ib.

3. **Instructions.** In an action against a landlord for injuries to the tenant's wife, caused by her stepping into an uncovered drain pipe on the premises, *held* that the negligence alleged in the petition was practically covered by the instructions summarized in the opinion; *held, further*, that the question of plaintiff's contributory negligence was covered by the instructions summarized in the opinion. Ib.

4. **Same: Instructions: Commentary on Evidence.** Where, in an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, the evidence showed that the landlord was a nonresident and that the premises were in the immediate care of his son as agent, an instruction, that if the son, at the time of the accident and prior thereto, was the agent of the landlord, and had knowledge of the condition of the premises a reasonable length of time prior to the date of the accident, his knowledge was notice to the landlord, was not objectionable as an undue comment on the evidence, or as singling out a particular fact in evidence. Ib.

5. **Injury Sustained on Demised Property: No Covenant to Repair: Liability of Landlord.** There is no implied warranty, in a contract of letting, that the premises are tenantable or suitable for the purposes for which they are let, or, in the case of a dwelling house, that it is either safe or convenient; and where the landlord is not guilty of creating a nuisance or of wilful wrong or fraud or culpable negligence, he is not liable for any injury suffered by any person occupying or coming upon the premises during the term of the lease. Korach v. Loeffel, 414.

6. **Pleading: Conclusions.** In an action against a landlord for injuries to the tenant's minor child from the falling of a metal plate over a grate in the demised premises, an averment in the petition, that "it was the duty of the defendant, by the terms and condition of the verbal lease aforesaid, to have said premises in a safe and proper condition for the use and occupancy of plaintiff, so that plaintiff could occupy said premises with safety," was a statement of the pleader's conclusion, and was not an averment that there was a covenant to repair. Ib.

7. **Liability of Landlord.** While a landlord who demises premises to different tenants, with part in common for the use of all, is bound to exercise ordinary care to keep such common part in a reasonably safe condition, he is not, in the absence of a covenant so to do, bound to exercise ordinary care to maintain or keep in repair premises demised as a dwelling, where the tenant is in possession of the whole premises; and hence where a tenant of a dwelling house was in possession of the whole premises, and the landlord had not covenanted to make repairs, a minor child of the tenant, who was injured by the falling of a metal plate over a grate, could not recover against the landlord. Ib.

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LANDLORD AND TENANT—Continued.

8. **No Covenant to Repair: Right of Landlord to Make Repairs.** Where a single dwelling is demised to one person and he is given possession of the whole premises and the landlord has not covenanted to make repairs, no one, not even the landlord, can enter, without his permission, to make repairs. Ib.

9. **Injury Sustained on Demised Property: Breach of Covenant to Repair: Liability of Landlord: Remote Damages.** The breach by a landlord of a covenant to make repairs to demised premises will not support an action for personal injuries due to the failure to make such repairs, because such injuries are deemed too remote to have been contemplated by the parties when the covenant was given. Ib.

LIBEL. See Criminal Libel.

LIFE INSURANCE.

1. **Assignment of Policy: Reassignment: Rights of Assignee.** Where a life insurance policy is assigned and the assignee assigns it to another, the latter takes no greater rights in the policy than his assignor had. Locke v. Bowman, 121.

2. **No Insurable Interest: Validity of Assignment: Rights of Creditors.** An assignment of a life insurance policy to one who has no interest in the life of insured is prima facie void, unless he is a creditor of insured, in which event it is valid only to the amount of the advances made. Ib.

3. **Establishing Right: Burden of Proof.** Where the assignee of a life insurance policy had no interest in the life of insured, and the latter brought an action to have the assignment declared a mere pledge to secure certain indebtedness, the assignment being prima facie void beyond the amount of the admitted indebtedness, the *onus* was on the assignee to show such facts as would render it valid and binding beyond such amount. Ib.

4. **Facts Stated.** The insured in a life insurance policy executed an assignment of the policy. The assignment was absolute in form, but insured claimed it was made to secure an indebtedness owing by him to the assignee. The latter, in turn, pledged the policy with a third person, and the latter, upon foreclosure of the pledge, bought the policy. The insured brought action to have the court declare the latter to be the holder of the policy only to secure the amount to secure which it was originally assigned. Defendant pleaded in his answer, among other defenses, that the policy was originally assigned to secure a much larger indebtedness than alleged in the petition. *Held*, that defendant had no greater rights in the policy than his assignor had; *held, further*, that, inasmuch as defendant had no interest in the life of insured, the assignment was prima facie void beyond the amount of the admitted indebtedness, and that the *onus* was on defendant to show such facts as would render it valid and binding beyond such amount. Ib.

5. **Assignment of Policy: Estoppel: Pledges.** The rule that the owner of personalty will be estopped from setting up his title as against a pledgee of it, where he has clothed the pledgor with evidence of ownership of it, has no application to a life insurance policy. Ib.

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LIFE INSURANCE—Continued.

6. **Estoppel: Laches: Petition Construed.** A petition, in an action to redeem a life insurance policy, alleged that plaintiff, the insured, executed, on September 14, 1905, an assignment of the policy, which was absolute in form but which in fact was made to secure an indebtedness owing by plaintiff to the assignee; that the latter, in turn, pledged the policy with defendant to secure a sum far in excess of plaintiff's indebtedness to said assignee; that default having been made in the payment owing by said assignee to defendant, the latter caused the policy to be sold to satisfy said indebtedness, and at said sale became the purchaser of it; that said assignee died in June, 1907, and at that time plaintiff was indebted to him in the amount of the original indebtedness and interest thereon. The prayer was, that the court declare defendant to be the holder of the policy only for the purpose of securing such indebtedness. *Held*, that plaintiff was not estopped to set up his title as against defendant, although he delivered the policy, together with an assignment, absolute in form, to defendant's assignor; *held, further*, that the petition does not show plaintiff was guilty of laches in failing to bring the suit before the death of defendant's assignor, since it does not appear that defendant was injured by the delay and that plaintiff had knowledge that his rights were being infringed and had an opportunity to establish them, before said assignor died. Locke v. Bowman, 121.

7. **Assignment of Policy: Action to Redeem: Tender.** In an action in equity to redeem a life insurance policy in the hands of an assignee under an assignment which was absolute on its face but which in fact was given to secure certain indebtedness, allegation and proof of a tender, before suit brought, of the amount of such indebtedness was unnecessary. Ib.

8. **Benefit Certificate: Soliciting Agent: Medical Examiner: Waiver.** An assessment company of life insurance had a form of application for a life benefit certificate divided into two parts. The first was merely an application for insurance, stating the amount and premium, etc. The second was an examination as to his health, freedom from disease, etc. The first was handled through a soliciting agent and the second through the medical examiner. An applicant informed the soliciting agent that he had the piles, a disease of the rectum, but the agent said it made no difference, and for him to say he had not, when asked that question by the medical examiner. The applicant then signed the soliciting agent's part of the application, and thereafter was examined by the medical examiner and answered that he did not have such a disease and warranted his answer to be true, and thereby obtained a benefit certificate. Within six months afterwards he died from an operation for the piles. It was *held* that there was no liability on the certificate. Mallen v. National Life Association, 503.

9. **Agent: Applicant: Estoppel: Good Faith.** If an applicant for insurance who is required to give information as to his health, diseases, etc., informs the proper agent of the company that he has a certain disease, and the agent says it amounts to nothing and refuses to put it down, or writes that the applicant has no disease,—his act binds the company, if the assured acted in good faith. Ib.

10. **Conspiracy.** If an applicant for insurance conveys true information of a disease he has, to an insurance company's proper

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LIFE INSURANCE—Continued.

agent, and then he and the agent conspire together to defraud the company by suppressing such information, there is no liability. Ib.

11. **Agency: Statute: Application: Fraud.** Though Sec. 6938, R. S. 1909, makes any person soliciting an application for life insurance, the agent of the company and not of the assured, such statute does not apply to a fraudulent conspiracy between the solicitor and the insured to deceive and defraud the company. but merely to the solicitor's acts within the limits of his agency. Ib.

12. **Change of Beneficiary: Reservation.** The unconditional beneficiary in a policy of life insurance has a vested interest therein which cannot be changed by the insured. *But* if the right to change the beneficiary is reserved in the policy, he may make the change. Robinson v. New York, etc. Co., 259.

13. **Exemption: Statute.** Sec. 5854 R. S. 1889, provides that if a person takes out a policy of life insurance payable to a married woman, it shall inure to the separate benefit and use of such woman and her children free from the claims of the creditors of the husband or other person taking out the insurance; and that if such woman should die before her husband, the policy should inure to the children free from claims of creditors, "any technical words or phrases in the policy to the contrary notwithstanding." *Held*, that such section was a statute of exemption and that it did not prevent the reservation in the policy for a change of beneficiary. Ib.

MAINTENANCE. See Appellate Practice.

1. **Defenses: Offer to Effect Reconciliation.** In view of Sec. 8295, R. S. 1909, providing for support and separate maintenance for a wife, that the allowance shall be for such time as the nature of the case shall require, and that the court shall from time to time make further orders as shall be just, a sincere offer of a husband, who had abandoned his wife and failed to support her, to take her back and maintain her with conjugal kindness and affection, even after a decree for separate maintenance, will defeat her right to separate maintenance. Creasey v. Creasey, 98.

2. **Same: Form of Judgment.** A judgment for separate maintenance in favor of a wife, whose husband has abandoned and failed to support her, should be so framed as to allow maintenance only until such time as the husband shall take her back and treat her with conjugal kindness and affection. Ib.

3. **Taking Case Under Advisement: Trial Practice.** In an action by a wife for separate maintenance, it is not error for the trial court to take the case under advisement and postpone its decision to a later date in order to give the parties an opportunity to become reconciled. Ib.

4. **Trial Practice: Reopening Case.** In an action by a wife for separate maintenance, the trial court has the discretionary power of reopening the case and hearing additional evidence on the husband's attempts to effect a reconciliation, after the case had been taken under advisement. Ib.

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MAINTENANCE—Continued.

5. **Defenses: Offer to Effect Reconciliation: Sufficiency of Evdence.** In an action by a wife for separate maintenance, evidence *held* to support a finding that defendant offered in good faith to take plaintiff back and maintain her with conjugal kindness and affection, and hence it is *held* that a judgment for defendant was proper. Creasey v. Creasey, 98.

6. **Res Adjudicata: Conclusiveness of Judgment.** A judgment for defendant, in an action by a wife for separate maintenance, on the ground that he had offered in good faith to take her back and maintain her with conjugal kindness and affection, would not be a bar to a future action for maintenance by the wife, if, upon a resumption of the marital relations, he should mistreat her, or, upon an attempt to return to him in accordance with his offer, he should repulse her. Ib.

MANDAMUS.

1. **Habeas Corpus: Refusal of Court to Proceed with Trial.** A circuit court, issuing a writ of *habeas corpus* and refusing to proceed further under it, will be required by mandamus to proceed with the trial and determination of the issues presented. State ex rel. v. Kinsey, 461.

2. **Bills of Exceptions: Refusal to Sign: General and Specific Reasons in Return: Pleading.** Where a trial judge, in his return to an alternative writ of mandamus, attempts to justify his refusal to sign a bill of exceptions on the ground it was untrue, and then proceeds to specify wherein it was untrue, the appellate court will disregard the general statement that the bill was untrue, which, standing alone, might have defeated the writ, and will determine whether the specific reasons set up justify his refusal, and if they are not sufficient, the writ will be made peremptory. State ex rel. v. Allen, 463.

3. **Same: Insufficient Grounds for Refusal: Facts Stated.** In a proceeding by mandamus to compel a trial judge to sign a bill of exceptions setting out the proceedings with reference to the denial of a motion to set aside a default judgment, the respondent averred in his return that he had refused to sign the bill because it was untrue, and then specifically averred that it failed to set out matters that occurred at the time the default was taken and that it included matters which the court would judicially notice. *Held*, that the general statement that the bill was untrue would be disregarded, in view of the fact that respondent specifically set out wherein he deemed it to be untrue; *held, further*, that the specific grounds set out were insufficient to justify respondent's refusal to sign the bill, since the appeal was prosecuted from the denial of the motion to set aside the default judgment and not from the judgment itself, and hence things that occurred at the time the judgment was rendered were immaterial and should not be incorporated in the bill, and since, also, matters that occurred before the trial judge, of which he took judicial notice, should be set out in the bill, in order that the appellate court may consider them; and hence it is *held* that the writ of mandamus should be made peremptory. Ib.

MARRIAGE AND DIVORCE. See **Appellate Practice; Divorce.**

MARRIED WOMEN. See **Statute of Limitations.**

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MASTER AND SERVANT. See Assault and Battery; Negligence.

1. **Contract of Employment: Evidence.** Where, in an action for services rendered, the issue was whether there was a contract of employment between plaintiff and defendant, the testimony of a witness that he was in defendant's office with plaintiff and was a party to a conversation between them in which defendant agreed to give plaintiff and the witness each a specified sum per week as expense money, was admissible to prove the existence of a contract of employment between plaintiff and defendant. Thornton v. Mersereau, 1.

2. **Action for Services: Instructions.** In an action on a *quantum meruit*. for services rendered, defended on the theory that plaintiff and defendant were partners in the work, defendant requested an instruction charging that if the jury believed the services sued for were performed under an agreement between plaintiff and defendant, and that defendant "did not, under such agreement, agree to pay plaintiff a salary for all or any part of such services, then plaintiff is not entitled to recover." *Held*, that it was proper to refuse the instruction, since it would have been error to have charged that plaintiff could not recover for "all or any part" unless defendant had agreed to pay plaintiff for all or any part, as plaintiff certainly was entitled to recover for such part of the services as he proved he had rendered. Ib.

3. **Negligence: Action for Injuries Inflicted by Servant: Instructions.** In an action for injuries from an automobile, where the only issue was as to its ownership and control, and the evidence on that issue was conflicting, an instruction, that if "defendant or his agent, in operating said automobile, . . . on the day alleged in plaintiff's petition, operated said car without observing the highest degree of care," and collided with plaintiff's horse and buggy, plaintiff could recover, was erroneous, for the reason it permitted the jury to affix liability against defendant if they found that his agent was operating the machine at the time, without requiring a finding that the agent was operating it for him or in the course of his employment. Warrington v. Bird, 385.

MECHANICS' LIENS.

1. **Liberal Construction: Name of Owner.** The mechanic's Lien Law should be liberally construed and an honest mistake, in the name of the owner of the building, not allowed to defeat the lien of the mechanic, when no rights of third persons have intervened. Knapp, etc. Co. v. Kansas City, etc. Co., 146.

2. **Notice: Name of Corporation.** When the property was correctly described but the notice was not addressed to the full name of the corporation, but served in the office of the corporation upon one of its officers, the notice was not invalidated thereby. Ib.

3. **Material Furnished: Inseparably Blended.** When the material furnished is inseparably blended in an account from which it cannot be distinguished, as to what is lienable, the entire lien is lost. Ib.

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MECHANICS' LIENS—Continued.

4. **Mistake in Notice: Subcontractor.** A mistake in the notice of a lien claim, given by a subcontractor to the owner, will not vitiate the notice unless it appears that the owner was misled thereby to his prejudice. Knapp, etc. Co. v. Kansas City, etc. Co., 146.

5. **Statement: Account: Exhibit.** It will be sufficient if the mechanic's lien statement filed with the clerk refers to the account filed therewith and attached thereto. The account need not be copied in the body of the lien statement. Berkshire Lumber Co. v. Chick Inv. Co., 342.

6. **General Contract: Evidence.** If there is one general contract to furnish material for buildings on contiguous lots, one mechanic's lien can be filed covering all the buildings. Ib.

7. **Material: Owner: Dissatisfaction.** If proper material is furnished under the contract and put in the building, it is properly allowed in full as a lien, though the owner becomes dissatisfied and has a part of it torn out. Ib.

MISCONDUCT. See **Attorneys; Change of Venue; Negligence.**

MORTGAGES. See **Equity; Fire Insurance; Special Taxbills.**

MOTION FOR NEW TRIAL. See **Appeal and Error; Appellate Practice; Bill of Exceptions; New Trial; References.**

Waiver: Points and Authorities. Objections saved in a motion for a new trial may be abandoned in the appellate court by the appellant, and if they are not mentioned in his brief of points and authorities, will be considered as waived. Miller v. Missouri, etc. Co., 330.

MOTION TO ELECT.

Answer: Waiver. Objection to an adverse ruling on a motion to elect, is waived by filing an answer and going to trial. Berkshire Lumber Co. v. Chick Inv. Co., 342.

MUNICIPAL CORPORATIONS. See **City Ordinances; Negligence; Special Taxbills.**

Defective Sidewalk: Pleading: Sufficiency of Petition: Aider by Answer. In an action against a municipal corporation for personal injuries sustained on a defective sidewalk, *held* that the petition, when construed, as it should be, with defendant's answer, states a cause of action, warranting the verdict and supporting the judgment for plaintiff. Angel v. Portageville, 16.

NEGLIGENCE. See **Appellate Practice; Carriers of Goods; Carriers of Live Stock; Carriers of Passengers; Humanitarian Doctrine; Instructions; Landlord and Tenant; Master and Servant; Station; Street Railways.**

1. **Action for Personal Injuries: Instructions: Sufficiency of Evidence.** In an action for injuries alleged to have been caused by a horse, which plaintiff was riding, becoming frightened at a wood pile alongside the road and, as a result, jumping in such a manner as to throw plaintiff off, the jury could infer, from evidence which tended to prove that the horse was not frightened and did not jump, that the injury did

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not occur in the manner alleged, and hence an instruction that plaintiff could not recover if he was injured from any other cause than the horse being frightened at the wood pile was not vulnerable to the objection that it was not warranted by the evidence; but, even if it were conceded that there was no evidence of any other cause, the instruction would not be *held* erroneous, since it was undoubtedly understood by the jury to mean that, in order to find for plaintiff, they must find that he sustained his injuries in the manner and from the cause alleged by him. Kiel v. Ott, 40.

2. **Humanitarian Rule: Electric Coupe.** This is an action to recover damages for the negligence of the defendant in causing its street car to run into an electric coupe driven by the plaintiff's daughter. She was driving south on the west side of Grand avenue and when she came to the intersection of Grand avenue and Gillham road, she started to turn up Gillham road, and had about cleared the southbound track, when the car ran into the coupe, and wrecked it. *Held*, that the demurrer to the evidence was properly overruled, and that plaintiff was entitled to recover under the humanitarian rule. Borders v. Metropolitan, etc. Co., 172.

3. **Due Care: Jury Question.** It was a question for the jury to decide whether or not the motorman acted with due care under the facts and circumstances shown by the evidence. Ib.

4. **Contributory Negligence: Defense.** Contributory negligence is not a defense to a cause founded on the humanitarian rule. Ib.

5. **Affirmative Defense: Contributory Negligence: Issue of Fact.** Contributory negligence, being an affirmative defense, must be pleaded in the answer to raise an issue of fact for the jury to determine. Ib.

6. **Instructions: Misconduct of Counsel.** Plaintiff sued for damages for personal injuries received while oiling the defendant's machinery. The evidence showed that plaintiff had to climb a ladder and pass one arm through a belt, which had been spliced and at one place was worn and frayed. The roughened and frayed edges of this belt caught on his sleeve and he was jerked over the pulley and was severely injured. Plaintiff's instruction regarding medical expenses incurred was not limited as in his petition and the inflammatory remarks of plaintiff's counsel during the argument were unrebuked. It is held that both of these matters constituted reversible error. Haake v. Dulle Milling Co., 177.

7. **Damages: Instructions.** A party is bound by the limits he places in his petition regarding the element of his damages and an instruction is erroneous and prejudicial in ignoring this restriction and enlarging the scope of the recoverable damages. This error cannot be cured by a remittitur because the influence that this error had on the jury cannot be determined. Ib.

8. **Proximate Cause: Hole in Sidewalk.** The plaintiff seeks to recover damages for injuries, received when she stepped into a hole in the sidewalk of the city of Sedalia. The hole was at one side of a water meter box, having been there for five days, and the sidewalk was only partially lighted

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on account of the shade trees. The hole had been temporarily repaired the day of the accident. *Held*, that the demurrer to the evidence was properly overruled. Perry v. Sedalia, 235.

9. **Verdict: Substantial Evidence.** If the evidence of plaintiff is substantial the verdict will not be disturbed, because the jury disbelieved the defendant's evidence instead of plaintiff's. Ib.

10. **Notice to Repair: Prejudicial.** When it is conceded that a party has actual notice in time to make repairs, the evidence on that point even if erroneously admitted would not be prejudicial to that party. Ib.

11. **Misconduct of Counsel: Prejudicial Error.** The statutes provide that an error to be ground for reversal of a judgment must be prejudicial to the party against whom it is committed. Thus a party cannot urge his adversary into an error, and then be heard to complain of that error. Ib.

12. **Automobiles: Compromise.** Plaintiff seeks to recover damages for personal injuries inflicted on him, and damages to his horse, wagon, and harness. The defendant's automobile was driven by his son, the only occupant of the car, when he came up behind the plaintiff's wagon, and in attempting to pass, the right rear wheel of the car struck the left front wheel of the wagon. Plaintiff was thrown out and injured, and his horse ran away, damaging the wagon and harness. The trial court allowed the plaintiff's counsel, over the defendant's objection, to state the offer of compromise in the presence of the jury. *Held*, this was reversible error. Marshall v. Taylor, 240.

13. **Same: Road Rules: Issue of Fact.** The question as to whether or not the plaintiff violated the road rules as provided in the Laws of Missouri, 1911, page 327, is an issue of fact and not of law. Ib.

14. **Master and Servant: Burden of Proof.** When a party contends that his own son was not acting as chauffeur for him at the time the accident occurred, but had become *sui juris*, the burden rests upon that party to show that he was not his servant. Ib.

15. **Evidence: Witnesses.** The question of whether the autoist had sufficient space in which to execute the attempted movement and exercised reasonable care were issues of fact raised by the pleadings and evidence and the witnesses should not have been permitted, as they were, to invade the province of the jury in solving them. Ib.

16. **Same: Efforts of Compromise: Public Policy.** All confidential overtures of pacification, or other propositions between litigating parties, stated to be without prejudice, are excluded on grounds of public policy. Ib.

17. **Contributory Negligence: Base Ball Parks.** The plaintiff sued to recover for personal injuries received while attending a baseball game in the defendants' ball park. He purchased a ticket which entitled him to a seat in the grandstand, protected from foul balls and wild throws by a

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wire netting; but instead of going there, he voluntarily chose to take a seat which was unprotected. During the progress of the game he was struck by a foul ball and injured. The trial court as a matter of law, declared that he was not entitled to recover. *Held*, that the plaintiff's contributory negligence was apparent and indisputable. Crane v. Kansas City, etc. Co., 301.

18. **Reasonable Care: Safety of Spectators.** The defendants were not insurers of the safety of spectators but, being engaged in the business of providing a public entertainment for profit, they are bound to exercise reasonable care, i. e., care commensurate to the circumstances of the situation to protect their patrons against injury. Ib.

19. **Full Knowledge of Dangers.** Where one attending a baseball game is offered a choice of two positions, one of which is less safe than the other, he cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chose the more dangerous place. Ib.

20. **Instructions: Roving Commission.** In an action by a pedestrian for injuries received by being struck by a taxicab in a street, where the petition counted on specific acts of negligence in running the taxicab at a dangerous rate of speed and in failing to check its speed or give plaintiff warning of its approach, an instruction, authorizing a verdict for plaintiff if the jury believed that the taxicab was being run at "a greater rate of speed than was reasonable" *or* that the driver "at said time was not using the highest degree of care that a very careful or prudent person would use under like circumstances . . . , and that by reason thereof, plaintiff was struck by said taxicab," was reversible error, in that the latter part did not confine the jury to the negligence alleged, but allowed them to return a verdict on any theory they might construct or evolve out of their own minds. McDonnell v. Columbia Taxicab Co., 351.

21. **"Turntable Doctrine:" Essential Elements.** In order that an action for injuries to a child may be maintained under the "turntable doctrine" of negligence, it is necessary that the machinery or appliance, the operation of which was the direct cause of the injury, be dangerous in itself, when set in motion, or be of a kind liable to become dangerous from the position or condition in which it is left, if set in motion, and defendant must be guilty of negligence in leaving such machinery or appliance unguarded, unsecured or unattended, in an open place frequented by children, so as to allow of its being put in motion by them. Hight v. American Bakery Co., 431.

22. **Same: Applies Only to Children.** The "turntable doctrine" of negligence is applied only in those cases in which the person injured is a child of tender years—on the borderland, as to age, between the irresponsibility of childhood and the responsibility of mature years. Ib.

23. **Same: Applicable Only to Defeat Contributory Negligence.** The negligence of the defendant lies at the very foundation of liability under the "turntable doctrine," and unless that is proved, the doctrine may not be invoked; and, indeed, it is to be invoked only to meet the defense of contrib-

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utory negligence on the part of the plaintiff, and not as the foundation of liability on the part of the defendant. Hight v. American Bakery Co., 431.

24. **Same: Difference Between Negligence and Actionable Negligence.** While the act of suffering a dangerous appliance, which, in itself or in its position, is a menace to children, to remain unguarded, is an act of deliberate carelessness, it does not necessarily follow that an action will lie for injuries sustained therefrom, since negligence and actionable negligence are distinguishable terms, and carelessness does not always involve liability, but before liability attaches, a duty on the part of the party charged toward the party injured must arise. Ib.

25. **Child Injured by Wagon: "Turntable Doctrine:" Sufficiency of Evidence: Burden of Proof.** Defendant's servants, for the purpose of advertising its products, threw into the air from one of its wagons in their charge, which was being driven along slowly, certain whirligig toys. Plaintiff, a boy ten years old, and other children followed the wagon, endeavoring to procure the toys when they fell to the ground. One of the toys fell under the slowly moving wagon, and plaintiff reached between the wheels for it, and one of the rear wheels passed over his arm, causing the injury complained of. Plaintiff brought suit under the "turntable doctrine" of negligence, and his petition, among other things, alleged that it was the purpose of defendant, in causing said wagon to pass along the street and in causing the whirligigs to be thrown into the air, to attract the attention of children thereto. *Held*, that this averment was not sustained by the evidence; *held, further*, that the burden of proving this averment rested on plaintiff. Ib.

26. **Same.** Where the purpose of a person sending up advertising toys from a wagon is to attract children and cause them to congregate around the wagon for the purpose of increasing his business, he owes the children who so congregate a very different duty from that which he owes a child who gets in the way of the wagon through his own impulse and without the knowledge or consent of such person. Ib.

27. **Same: Sufficiency of Evidence: Contributory Negligence: Facts Stated.** Defendant's servants, for the purpose of advertising its products, threw into the air from one of its wagons in their charge, which was being driven along slowly, certain whirligig toys. Plaintiff, a boy ten years old, and other children followed the wagon, endeavoring to procure the toys when they fell to the ground. One of the toys fell under the slowly moving wagon, and plaintiff reached between the wheels for it, and one of the rear wheels passed over his arm, causing the injury complained of, for which he brought suit under the "turntable doctrine" of negligence. *Held*, that, although the toys were attractive to children, the act of throwing them from the wagon or the failure of defendant's agents to watch their flight was not actionable negligence, and there being no proof that the wagon was driven negligently, or that defendant's servants had knowledge of plaintiff's dangerous position, and plaintiff never having been in front of the team, defendant's servants were not guilty of negligence in failing to look behind to see that he did not get under the rear wheels; and hence it is *held* that defendant was

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not guilty of actionable negligence and, therefore, plaintiff was not entitled to recover. *Held, further,* that plaintiff was guilty of contributory negligence in placing his arm between the wheels of the moving wagon, and that the "turntable doctrine" was inapplicable and could not be employed to relieve him of his contributory negligence. Ib.

28. **Driving Wagon: Duty of Driver.** It is the duty of the driver of a wagon to look ahead, in the direction in which he is going, and he is not guilty of actionable negligence in failing to look behind to see what happens after the wagon has passed. Ib.

29. **Child Injured by Wagon: "Turntable Doctrine:" Contributory Negligence.** Where a ten-year-old boy placed his arm between the wheels of a moving wagon to seize a toy which had fallen under the wagon, knowing that, if the wagon did not stop and he did not get his arm out in time, the wheel would pass over and injure it, and he was so injured, he was guilty of contributory negligence as a matter of law. Ib.

30. **Same: Proximate Cause.** Where, in order that he might seize a toy which had been thrown from a slowly moving wagon and which had fallen under the wagon, a ten-year-old boy placed his arm between the wheels, and one of the rear wheels caught and injured it, his act in placing his arm between the wheels, and not the attractiveness of the toy, was the proximate cause of the injury. Ib.

31. **Boarding House: Guest: One Management: Two Houses.** Two persons conducted a boarding house which adjoined and was attached to another house by the side owned by one of them. The houses adjoined and were attached; a common porch ran in front. A register of guests, a dining room and a parlor in one was used in common for both houses, and one of the persons collected from the guests in either house. The halls and public places in each were used in common. The evidence tended to show that the two were conducted as one establishment. A woman guest took board and a room in one of the houses. In a few days she went to visit a friend rooming in the other house and remained until nearly dark. As she started to leave she asked for the toilet room and was directed to go down to the lower end of a hallway. She went, and finding a door ajar, supposing it led into the toilet, she pushed it open thinking to step inside and turn on the electric light. Instead, she fell headlong in the dark onto a steep stairway into the cellar, and was injured. It was *held* that the boarding house keepers were liable. Rumann v. Montfort, 523.

32. **Innkeepers: Duty: Premises.** Keepers of a public inn are considered as inviting guests to their premises and it is their duty to keep their premises reasonably safe for the use of their guests, a failure in which is negligence. Ib.

33. **Same: Pleading: Instruction.** An instruction for plaintiff must not depart from the issues tendered in the petition; but it need not use the language of the pleading. It is sufficient if it submits, in practical effect, the same facts, with certainty. Ib.

34. **Stepping Off a Street Car: Credibility of Witness.** The plaintiff sued to recover damages sustained by the neg-

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ligence of the defendant in operating its street car. The plaintiff and her nephew were riding on the defendant's street car and, desiring to transfer at the end of the line, the plaintiff was in the act of stepping from the rear vestibule to the first step, when the car suddenly started forward, throwing her to the pavement and injuring her. *Held*, that the judgment in her favor will not be disturbed. Scott v. St. Joseph, etc. Co., 527.

35. **Perjury or Mistake: New Trial.** The statute (Sec. 2022, R. S. 1909) makes it the duty of the trial judge to grant a new trial, when satisfied that perjury or mistake has been committed by a witness and such injury or mistake resulted in an improper verdict. Ib.

36. **Assumption of Risk.** Where plaintiff's injury was not the result of dangers inherent in the nature of his employment but was the result of defendant's negligence in raising and lowering the cage without a signal, there is no assumption of risk in the case. A servant does not assume risks caused by his employer's negligence. He assumes only the risks which are liable to happen on account of the nature of his employment when the master has used the care that the law requires of him. Bowman v. Marceline, etc. Co., 703.

37. **Contributory.** A cager having to rapidly push a loaded car on to a cage saw the cage in position and started his car to it, leaning far forward with his hands wide apart on the car to exert the necessary force; he knew the car would not move until he gave a signal or first received one from the engineer. Just as the car started to go upon the cage, the latter was suddenly raised about ten feet, remained there just long enough to allow the car to fall into the space it had just vacated, and then was immediately lowered again striking and injuring plaintiff, and both movements without signal. *Held*, that plaintiff was not guilty of contributory negligence in not keeping his eye on the cage or in not stopping to see if the cage would remain in position. Ib.

38. **Same: Failure to Use Signals: Statute.** Regardless of whether the statute, Sec. 8456, R. S. 1909, required signals for the safety of the cagers, yet, as the evidence showed a system of signals was in use in the movement of the cages, it was negligence to move them without giving the customary signals. To move the cage up and down suddenly and without warning to the men working on the cage would be the grossest negligence. Ib.

39. **Pleading: Defective Sidewalk: Duty of City.** In a suit for injuries caused by a defective sidewalk, it is not necessary for the petition to contain an allegation that it was the duty of the city to keep the sidewalk in a reasonably safe condition. Facts must be stated so that from them such duty will arise as a necessary legal conclusion, and, when that is done, this is sufficient so far as alleging the duty of the city is concerned. Coulter v. Independence, 710.

40. **Existence of Street: Duty of City.** Evidence that the street in question was and had been for years an open public traveled street in the city, that it had been graded some twenty-five years before, that there were houses fronting on both sides of the street at the point in question, that there was a sidewalk along the entire east side of the street, that the side-

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walk along the west side, where the injury occurred, ran south to the corner, and that "most everybody" in that locality traveled over that sidewalk, is sufficient to show that it was such as the city was bound to keep in reasonable repair. Especially when the city officers testified, and did not deny the city's acceptance but merely said no complaint of defects in the sidewalk had ever been made to them. Ib.

41. **Employee: Bridge Work: Foreman.** Plaintiff's father was employed by a bridge company as a laborer in building a bridge across the Missouri river. He was standing on a girder seventy-five feet above ground, when knocked off and killed. An electric engine ran a derrick with boom and large heavy chain which was swung around from place to place in the work. The custom was for the chain to be so kept up that it would be higher than the heads of the workmen. The foreman always gave the signal to the engineer to start by calling out "boom around," and it was his duty to call a warning to the workmen if the chain was swinging low. The foreman signalled the engineer and the boom started with the chain lower than the heads of the workmen and no warning of this was given. The chain struck deceased from behind, knocking him to the ground below. It was *held* that defendant, through its foreman, was guilty of negligence and was liable to plaintiff as only surviving child. Harris v. McClintic, etc. Co., 724.

NEGOTIABLE INSTRUMENTS. See **Banks and Banking; Bills and Notes.**

NEW TRIAL. See **Motion for New Trial; Negligence.**

1. **Excessive Damages: Offer to Remit: Indefinite Offer.** The trial court did not err in granting a new trial on the ground the verdict was excessive, notwithstanding plaintiff offered to remit the excessive portion, where he did not indicate how much he was willing to remit, or on what counts, but threw the burden of determining the proper amount on the court, since a remittitur should be stated in such a definite manner that the court may act intelligibly on it. Blackmer, etc. Co. v. Mobile, etc. Co., 22.

2. **Preponderance of Evidence: Prejudice of Jury.** In an acton where plaintiff's case rested almost exclusively on his own testimony, and his credibility was attacked, it is *held*, under the evidence, that there was no such preponderance of evidence in his favor as warranted a new trial on the ground that a verdict for defendant resulted from prejudice, corruption, or gross ignorance of the jury. Kiel v. Ott, 40.

3. **Perjury or Mistake: Discretion of Court.** Sec. 2022, R. S. 1909, authorizing the granting of a new trial if the court is satisfied that perjury or mistake was committed by a witness, occasioning an improper verdict or finding as to such matter, and that the moving party has a just cause of action or defense, gives the trial judge a wide discretion in granting a new trial on such ground, subject only to its reasonable exercise under the facts. Byrd v. Vanderburgh, 112.

4. **Surprise: Trial Practice.** It is a general rule that each party must understand his case and come prepared to meet the case made by his adversary; and a party cannot,

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NEW TRIAL—Continued.

therefore, be surprised that his adversary introduced testimony in support of the issues made by the pleadings, even though such testimony was false; and hence, in attachment proceedings involving the right to possession of hoops, where the only issue was whether interpleader, who purchased the hoops from the debtor, had taken actual possession thereof, and interpleader, in order to establish that it had taken possession, introduced evidence that it had marked the hoops, interpleader was not entitled to a new trial on the ground that it was surprised because plaintiff's witnesses testified that the hoops were not marked when the attachment levy was made, although the fact that they were so marked was not denied at the trial in the justice's court, where the case originated. Kiel v. Ott, 40.

5. **Same: Appellate Practice.** If a party is surprised by an unforeseen occurrence at the trial, such as the admission of evidence, he should immediately apprise the court of his surprise and ask for a reasonable postponement to enable him to produce counter evidence; and if he fail to do this, he is in no position to urge his surprise as ground for a new trial. Ib.

ORDER OF TESTIMONY.

Discretion. The trial court has large discretion as to the order of the testimony and where the plaintiff has been permitted to introduce evidence in chief, after defendant had closed, no harm being shown to have resulted, it is not a cause for reversal. Berkshire, etc. Co. v. Chick, etc. Co., 342.

OFFER OF JUDGMENT.

1. **Costs: Justice of the Peace.** If in an action before a justice of the peace, an offer of judgment is made by defendant before trial and it is not accepted by the plaintiff, and he does not afterwards recover more than the sum offered, the costs accruing after the offer will be assessed against the plaintiff. Ramsey v. Rothwell, 271.

2. **Repeated Offer: Circuit Court.** In an action appealed from a justice of the peace to the circuit court, an offer of judgment made by defendant, before the justice need not be repeated in the circuit court. Ib.

3. **Election of Counts.** If a plaintiff, on defendant's motion, is compelled to elect to prosecute his action on two counts and abandons the third (all arising out of the same transaction), it does not deprive defendant of the benefit of an offer of judgment made before the trial. Ib.

4. **Tender.** The statute permits a defendant to save himself from the costs of an action by an offer of judgment without a tender of anything. Ib.

5. **Judgment: Clerk: Taxing Costs.** If there has been an offer of judgment by a defendant to a plaintiff which the latter did not accept and he afterwards does not recover more, it is error under the statute to render judgment in favor of the plaintiff for all of the costs, which cannot be remedied by the clerk taxing the costs contrary to the judgment. Such error is properly reached by a motion for new trial or in arrest, filed within four days. Ib.

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OFFER OF JUDGMENT—Continued.

6. **Motion to Retax: Suggestion to Court: Continuance: Power to Correct Judgment: Discretion.** If an offer of judgment is made by a defendant and not accepted by a plaintiff, and thereafter he does not recover more than the sum offered, and a judgment is rendered against defendant for the costs arising after the offer and no motion for new trial or in arrest is filed by defendant, yet if during the term, though more than four days after the judgment, he files a motion to retax the costs, it may be considered by the court, if it so desires, as a suggestion for an exercise of its power to correct the judgment on its own motion. And if the motion to retax is continued to a subsequent term, it will carry the case with it and the judgment may be corrected at such term. Ib.

PARTIES. See Special Taxbills.

Defect of. One Davis materially aided plaintiff in finding a purchaser for the land in question under an agreement with the plaintiff that he should receive half of the commission. Defendant contended that Davis was a necessary party to the suit. Davis' testimony was that he had no contract with defendant and expected no pay from him, but from plaintiff. *Held*, that Davis was not a necessary party to the suit. McCormick v. Obanion, 606.

PARTNERSHIP. See Appellate Practice; Personal Property.

1. **How Established: Question for Court or Jury.** The fact of partnership is a matter for determination by the jury, if there are facts in evidence warranting a verdict to that effect; it being the province of the court, however, to determine whether or not there is such evidence. Thornton v. Mersereau, 1.

2. **What Constitutes: Participating in Profits and Losses.** The determination of the question of whether a contract is one of partnership depends upon the evidence, but mere participation in the profits and losses does not necessarily constitute a partnership between the participating parties. Ib.

PAYMENT.

What is. Payment of a debt need not be in money, necessarily; anything of value upon which the parties agree is considered payment. McCormick v. Obanion, 606.

PERSONAL INJURIES. See Damages; Municipal Corporations; Negligence.

1. **Collision: Humanitarian Rule.** Where the driver of a covered wagon drives onto a street car track where a car is approaching from the rear, the place being such that the motorman must have seen his peril in time to have stopped the car, and yet collided with the wagon and injured him, the street car company is liable in damages under the humanitarian rule. Harris v. Metropolitan, etc. Co., 336.

2. **Vigilant Lookout: Ordinance: Common Law.** It is the duty of a motorman driving a street car in a populous part of a city to keep a vigilant lookout for vehicles, even though there is no municipal ordinance to that effect. Such duty is required by the common law. Ib.

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PERSONAL INJURIES—Continued.

3. **Instruction: Damages: Maximum Sum.** It is not improper in instructing on the measure of damages, to state that the verdict could not exceed the amount of damages claimed in the petition. Harris v. Metropolitan, etc. Co., 336.

PERSONAL PROPERTY.

1. **Sale: Partners: Delivery.** Two partners owned a typewriting machine which was in their office. One sold it to his brother by executing a bill of sale, but the purchaser did not take possession at the time. He let it remain during the day of his purchase, all of next day, and until midnight of the next night, when he entered the office and took it away. But in the mean time, on the day preceding the night he took it away, the other partner sold it to another and gave him possession by giving him the key to the room, the purchaser locking it up. It was *held* that there was no delivery and change of possession to the first purchaser, and that there was such delivery and change of possession to the second purchaser; and that the first purchaser was liable to the second for the value of the machine. Edwards v. Schreiber, 197.

2. **Change of Possession: Delivery of Key.** Where there is an article of personal property in a room and it is sold to a purchaser, the delivery of the key to the room and the purchaser assuming control by locking it up, is a sufficient delivery and change of possession to satisfy the statute. Ib.

3. **Bill of Sale: Fraudulent Conveyances: Statute.** The mere execution of a bill of sale for an article of personal property which is at hand and capable of being taken bodily, is not such a delivery and change of possession as required by the statute for a valid sale. Ib.

4. **Instruction: Matters Conceded: Reversible Error.** It is not reversible error to omit in an instruction matters which are admitted, or conceded, or about which no question is made. Ib.

PHYSICIANS AND SURGEONS.

1. **Implied Contracts: Adult Children.** The plaintiff sued to recover compensation for surgical services performed on an adult daughter of the defendant. The defendant was the administratrix of her deceased husband's estate. The plaintiff first visited the home of the defendant to consult with local doctors about the daughter's condition; later he performed three operations on her. For the first visit and operation he received his compensation from defendant and he now sues to recover for the last two operations on the theory of an implied promise to pay. *Held*, that such a promise must rest on facts and circumstances that would be incompatible with any other inference than that the parent intended to be regarded by the physician as his employer. Since there are no circumstances in this case indicative of such intention, judgment was properly rendered for defendant. Crowell v. Donoho, 305.

2. **Same.** The mere request from a father to a physician to attend a child of full age, and for whom he is not bound to provide, and though sick at the father's house, raises no implied promise upon his part to pay for such medical services. Ib.

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PHYSICIANS AND SURGEONS—Continued.

3. **Same: Services to be Rendered.** A contract should be implied where the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for services to be rendered. Ib.

PLEADING. See **Appellate Practice; Contracts; Damages; Fire Insurance; Fraternal Beneficiary Associations; Landlord and Tenant; Motion to Elect; Municipal Corporations; Replevin.**

1. **"Answer" to Reply.** An "answer" to a reply is unknown under the code; Sec. 1811, R. S. 1909, providing that the reply shall be the last pleading in a cause. Murphy v. Lorwood, etc. Co., 11.

2. **Demurrer: Waiver by Answering Over.** By answering over after his demurrer to the petition has been overruled, defendant loses the benefit of the demurrer, save as to the lack of jurisdiction of the court over the subject-matter or the failure of the petition to state facts sufficient to constitute a cause of action. [See Sec. 1804, R. S. 1909.] Angel v. Portageville, 16.

3. **Defective Petition: Aider by Answer.** Defective allegations of a petition may be supplied by the averments of the answer. Ib.

4. **Variance.** A recovery cannot be had on a different theory than that counted on in the pleadings. Cronan v. Stutsman, 46.

5. **Justices of the Peace: Statement: Sufficiency.** The following statement before a justice of the peace was *held* to be sufficient to invoke the jurisdiction of the justice:

"Plaintiff for cause of action states that defendant is indebted to him in the sum of three hundred dollars for moneys advanced and actually paid by plaintiff for and on account of defendant at his instance and request, as rent on certain real estate on the southwest corner of Eleventh street and Locust Street in Kansas City, Missouri.

Wherefore, plaintiff prays judgment for three hundred dollars." Leslie v. Tiernan, 340.

6. **Pleading Over: Effect on Abandoned Pleading.** Where, after a demurrer to a petition is sustained, plaintiff files an amended petition, the original petition disappears from the case. Korach v. Loeffel, 414.

7. **Defective Petition: Aider by Verdict.** Where defendant pleads over after his demurrer to the petition is overruled and a verdict is returned and a judgment is rendered for plaintiff, the fact that the petition states the cause of action counted on in an imperfect manner is not a ground for setting aside the verdict or arresting the judgment. Hight v. American Bakery Co., 431.

8. **In Justice Court.** Pleading in justice court is not scrutinized by as strict rules as in a circuit court. Windle v. Southwest, etc. Co., 596.

9. **General Denial.** Under a general denial, the plaintiff cannot urge a waiver on the part of the defendant of fraud or misrepresentation and a ratification of the contract. Dyer v. Cowden, 649.

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PLEADING AND PROOF.

Immaterial Variance. The plaintiff must plead the ultimate facts upon which he relies for recovery and the proof must in all material respects conform to the allegations of the complaint. But an immaterial variance is not fatal. McCormick v. Obanion, 606.

PRACTICE (APPELLATE). **See Appellate Practice.**

PRACTICE (TRIAL). **See Actions; Appellate Practice; Attachment; Carriers of Goods; Courts; Divorce; Evidence; Indictment; Maintenance; Negligence; New Trial; Order of Testimony; Verdicts.**

1. **Reopening Case: Discretion of Court.** It is a matter of discretion with the trial court to admit or exclude testimony after a case has once been closed, and such discretion will not be interfered with on appeal, except in case of its manifest abuse. Creasey v. Creasey, 98.

2. **Argument: Jury.** No error is committed by the court in forbidding counsel, in the argument to the jury, to make statements which were merely an incorrect exposition of the legal effect that would follow a verdict for plaintiff. Manning v. McClure, 533.

PRINCIPAL AND AGENT. **See Agency.**

PRINCIPAL AND SURETY. **See Justices of the Peace.**

1. **Building Contract: Failure of Principal to Sign Bond: Liability of Surety.** Where a builder's contract appeared on one side of a printed sheet and the bond for performance on the other, each instrument aptly referring to the other and contemplating that the contract by its terms should be parcel of the bond, and the principal signed the contract, the surety on the bond was bound thereby, although the principal did not sign it, since the principal was bound in the first instance by the contract and the bond showed that it was a complete instrument when executed by the surety alone. Roennigke v. Essig, 363.

2. **Same: Failure of Obligee to Retain Stipulated Percentage: Discharge of Surety.** Where a building contract stipulates that the owner shall withhold from the contractor a percentage of the contract price as a security against liens and until such liens are settled, the surety on a bond, conditioned upon the performance of the contract and the payment of all lien claims by the contractor, is discharged if the owner surrenders this security without his consent; but where a building contract provides that the owner shall during the course of construction, pay the contractor a certain percentage of the contract price, and that the retained percentage shall be paid to him ten days after the building is completed and on its acceptance by the owner, and the owner pays the contractor the retained percentage ten days after the building is completed and on its acceptance by him, the surety on a bond, conditioned upon the performance of the contract and the payment of all lienable claims by the contractor, is not thereby discharged from liability for lienable claims subsequently paid by the owner, since the retained percentage was paid in accordance with the contract, and the surety, under the terms of the contract and bond, consented to its being so paid. Ib.

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PRINCIPAL AND SURETY—Continued.

3. **Recovery on Suretyship.** A surety cannot recover from the principal until he first pays the surety debt. McCormick v. Obanion, 606.

PROBATE COURTS. See **Guardian and Ward.**

1. **Demands: Sufficiency of Statement.** A demand filed in the probate court against an estate, for legal services covering a period of over four years, stating that claimant's services consisted of managing the entire estate, loaning money, collecting interest, attending to renting and repairing real estate, buying and selling real estate, examining titles, drawing deeds and wills, making tax returns, appearing before the board of equalization, paying taxes, attending to business away from home at his own expense, giving legal advice whenever needed, and doing generally all necessary to be done in preserving the estate—and stating the reasonable value of such services—is sufficient, under Sec. 2119, R. S. 1909, after trial on the merits, to support a verdict and judgment for such services. Sandusky v. Courtney, Admr., 325.

2. **Same: Trial on Merits: Waiver.** An objection to the sufficiency of a demand against an estate, raised by motion to make such demand more definite and certain, is waived by going to trial on the merits. Ib.

PROMISSORY NOTES. See **Bills and Notes.**

PROXIMATE CAUSE. See **City Ordinances; Negligence.**

RAILROADS. See **Humanitarian Doctrine; Station.**

REAL ESTATE. See **Contracts; Dower.**

1. **Direct or Indirect Transfer.** The vendor cannot defeat the broker's right to a commission by conveying the property to a third person for the benefit of the customer. Hamilton v. Davison, 620.

2. **Deed Without Reservation: Passes Title to Fixtures to Grantee.** A deed to realty which does not reserve fixtures thereon located, passes title to same to grantee. Muehling v Magee, 675.

3. **Not Permitted to Vary Orally.** The grantor is not permitted to set up an oral agreement under which he would claim that it was not the intention of the parties to the deed that the fixtures were to pass. This would be varying the terms of the deed. Ib.

REAL ESTATE BROKERS.

1. **Commission.** Where the owner tells the agent he can price the land at $130 per acre but that if it is sold, he, the owner, must have $125 an acre net to him, and never varies from those terms, and the land is sold for $125 per acre to a purchaser who would not have paid more, and the sale at $125 is made by the owner in good faith and not to deprive the agent of his commission, the agent cannot recover even though the purchaser be of his procuring. Cies v. Gale, 282.

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REAL ESTATE BROKERS—Continued.

2. **Rule as to Brokers' Contracts.** When a contract is made on a condition, a person seeking to recover on such contract must bring himself within such condition. And this applies to brokers' contracts. Cies v. Gale, 282.

3. **Exchange: Procuring Cause.** An owner of a grocery store in Missouri authorized a real estate agent to notify him when he found a suitable farm for exchange for the store. The agent found that another agent had advertised a farm in Oklahoma for exchange and notified the owner of the store. They went together to see the other agent and found that that farm had been sold and could not be had. The owner testified that that ended any connection or relation between them; and that afterwards this agent to whom he had been thus introduced found a farm in Missouri which he traded for the grocery store and forty acres of land, and that the first agent had no knowledge of or connection with the trade. It was *held* that, if the jury believed this evidence, a verdict should have been returned for the owner of the store, and instructions submitting such hypothesis should have been given. Hurxthal v. Dalby, 538.

4. **Two Agents: Introduction.** The mere fact that one agent introduces a person to another agent to secure a trade for a certain farm in the latter's hands which it is ascertained cannot be had, will not entitle such agent to a commission for a trade for another farm made through the second agent, with which trade the first had nothing to do. Ib.

5. **Right to Commission: Must Fulfill Seller's Requirements.** The landowner may fix the price and terms on which he will sell, and unless the broker produces a purchaser ready, willing and able to buy at that price and on those terms, the landowner may refuse to sell and the broker is entitled to no commission. McCormick v. Obanion, 606.

6. **Sale by Owner.** After allowing the broker every opportunity to make the sale on the terms fixed and the agent failing, the landowner may, as a new deal, sell the land to the same customer on more favorable terms and at a reduced price and not be liable to the broker for a commission. Ib.

7. **Failure of Seller to Restrict to Cash Sale.** The seller had a right to demand the entire payment of the purchase price in cash and to make that demand even after the broker had procured a purchaser ready, willing and able to buy at the price named on other than cash terms. But unless the seller demanded a cash payment before the consummation of the transaction, the broker was not restricted to a cash sale, to be entitled to a commission. Ib.

8. **Executed Contract of Sale.** There is a wide difference between cases where a sale is actually consummated and where commission is claimed even though the landowner refuses to make the sale. Ib.

9. **When Entitled to Commission.** The owner thereof placed certain real estate in the hands of a real estate agent to sell. The latter exerted himself to find a buyer, found one and brought him and the owner together with the result that a negotiation ensued which led to a sale. *Held*, that the broker was the pro-

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curing and efficient cause of the sale and was entitled to compensation therefor, even though the bargaining and selling were done by the owner without further assistance from the agent. Hamilton v. Davison, 620.

10. **Commission: Right to.** To solve the problem of a broker's right to commission, two things must be kept in mind: 1st. What was the broker employed to do? 2d. Has he completed his undertaking? If he was employed to do a certain thing and has accomplished that thing within the time required, or, where no time is specified, within a reasonable time, then he is entitled to his commission. Dillard v. Field, 206.

11. **Same: Changed Conditions.** Where a broker is employed to sell either the whole or certain specified parts only of a farm, and in the effort to sell one of those parts, introduces a prospective buyer to the owner but no sale is effected, and nothing more is done for eight or ten months, when the owner, through no help or assistance of the broker sells a portion of the farm to another buyer, which sale so changed the farm as to make possible the sale of a different portion of the remainder from any that could have been sold prior thereto, the fact that the former prospective buyer, through no help or assistance of the agent, learns of the changed conditions and renews negotiations which result in a sale to such buyer of a different part from that shown to him in the first place, does not entitle the agent to commission, in the absence of bad faith on the part of the owner. Ib.

12. **Same: Disclosure of Purchaser.** Wherever an introduction, or advertisement, or disclosure of purchaser is relied on to entitle the broker to commission, the evidence must show that such was the foundation of the negotiations which resulted in a sale although conducted and concluded by the owner. When the evidence shows that the introduction was only a link in a chain of causes and not the *causa causans*, the broker cannot recover. Ib.

13. **Same: Variation in Both Price and Thing Sold.** Where the sale made varies from the broker's contract, both in price and in the thing sold, there can be no recovery of commission. Ib.

14. **Duties: Right to Commission.** Where a landowner, desiring to exchange his farm lands in another State, is informed by the agent that the latter is working for a land company in such State trying to sell lands it has for sale, and the landowner tells him that, if he obtains a trade out there which he can accept, he will pay him in addition to what the company pays, and the agent either through his own efforts, or by working through the land company and in conjunction with it, secures the landowner a trade for land which the company had for sale, the agent is entitled to his pay. In such case he has earned his commission by bringing the landowner and the land company together so that through the company a trade was obtained. Weidemeyer v. Woodrum, 716.

15. **Abandoning Efforts.** Where the agent has done all that he can do and has enabled the landowner to secure a trade but the agent does not know it because the matter has been kept from him,

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REAL ESTATE BROKERS—Continued.

a letter written after the contract of trade was made but before the deeds were made, saying there was "nothing to" the land company but which letter did not injure the trade in the least, is not an abandonment of effort on the part of the agent such as will bar his right to recover. Weidemeyer v. Woodrum, 716.

16. **Instructions.** It is error to instruct the jury that if the trade was made solely by another agent and defendant has paid him plaintiff cannot recover. First, because the evidence doesn't show it was made solely by such other. Second, the payment of the other agent has nothing to do with plaintiff's right to a commission and is always misleading to a jury. Ib.

17. **Same.** Matters which are not in dispute but which are admitted ought not to be submitted to the jury as among the things it must find before returning a verdict for plaintiff. And to tell the jury that the burden is on plaintiff to establish such admitted fact makes the submission of such admitted fact more prejudicial. Ib.

REFEREES.

1. **Exception to: Must be Filed Within Four Days After the Return of the Report.** The motion to set aside the referee's report in this case, while so worded as to be different in form, was in reality a series of exceptions to the report, and having been filed long out of time was properly overruled. Kansas v. Forsee, 213.

2. **Right to Modify.** The right of a court of equity to modify a referee's report, especially when the court has before it all the evidence upon which the referee's report is based, is too well settled to require discussion. Ib.

REMEDY. See Certiorari; Contracts; Offer of Judgment.

REMITTITUR. See Damages.

REPLEVIN.

Rescission: Pleading. In a replevin suit based upon a rescission of a contract for false and fraudulent representations, it is not necessary that the petition should use the word "rescinded." If it states facts from which a rescission follows as a legal consequence, this is sufficient. The petition contains all the allegations necessary in this kind of a case. Manning v. McClure, 533.

RESCISSION. See Contracts; Replevin.

RES ADJUDICATA

Matters Concluded: Foreign Corporations: Right to Sue. A judgment of a court having jurisdiction of the parties and subject-matter is conclusive on the parties as to all matters in issue or tried, or which could have been tried, and the right of a foreign corporation to maintain an action is an issue than can be tried, and hence a judgment for such a corporation is conclusive as to its right to maintain the action. Scientific American Club v. Horchitz, 35.

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ROADS AND HIGHWAYS.

SALES. See Personal Property.

1. Account: Evidence. Where defendant admits that, every time he ordered coal shipped to him, an acknowledgment of the order was sent him by the vendor in which were stated the number of cars, character of coal, the date when to be shipped, and the price per ton, and further admits that, when the shipment was made, an invoice was sent to and received by him, in which were stated in detail the date, the car number, the weight of the coal, the price per ton, and the total amount due, all of which corresponded to the items set out in the account sued on, this establishes, prima facie, a separate sale of each car of coal at the prices stated in the invoices. Serat v. Feagans, 506.

2. Purchase Under One General Contract: Burden of Proof. Under the above circumstances, if the vendee claims the coal was purchased under one general contract to furnish all coal desired by him for a specified purpose at a different price, the burden is on him to establish it by the clearest proof, since it is in direct conflict with dealings actually had between them. Ib.

3. Statements of Seller: As Facts or Mere Opinions. Statements as to the quantity of a stock of goods, if made positively, as of one's own knowledge, by one apparently in a position to know the truth, which are relied upon by the person to whom made, are statements of facts and not mere expressions of opinion. Dyer v. Cowden, 649.

4. Relied on by Purchaser. The merchandise in question was contracted for on an invoice and not in bulk, and the purchaser had a right to rely upon any statements made by the seller in regard thereto, and if those statements were false, the plaintiff (seller) cannot recover. Ib.

5. Caveat Emptor: Representations. If a dealer in automobiles is informed that a purchaser knows nothing of them and must depend altogether upon the dealer in getting one that will be suitable for the purposes disclosed, such purchaser may properly rely upon the representations of the dealer as to the quality of the machine. Tiffany v. Times, etc. Co., 729.

SLANDER. See Criminal Slander.

SPECIAL TAXBILLS. See Appellate Practice; Interests; Stare Decisis.

1. Street Improvements: Conformity to Specifications. In the work of putting down street improvements, a substantial compliance with the specifications is sufficient. Whether there has been a substantial compliance depends somewhat on the circumstances of each case. Trimble v. Stewart, 276.

2. Cancellation. A variation from the specifications which does not materially change the character, location or cost of the improvements, or work a fraud on the public, or give an advantage to the contractor, or injure the appearance, or value of the property, is not sufficient to justify the cancellation of the taxbills by a court of equity. Ib.

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SPECIAL TAXBILLS—Continued.

3. **Apportionment of Cost.** Where a street in a city of the third class is graded and paved as one improvement, the whole cost is apportioned to the abutting property according to the front foot without regard to the fact that the paving is forty feet wide in the business blocks and only thirty feet wide in the residence blocks. The law does not require uniformity in width. Trimble v. Stewart, 276.

4. **Enforcement: Parties Defendant: Prior Incumbrancers: Rights: Mortgages and Deeds of Trust.** Beneficiaries of prior incumbrances upon land hold the same right against the lien of a special taxbill for street improvements as a junior mortgagee holds against a prior mortgagee. The former is a proper, but not a necessary, party to a proceeding to enforce the superior lien by foreclosure. If not made a party, he is not confined to his right to redeem, but may attack the validity of the prior incumbrance in any subsequent proceeding; but his right to redeem before foreclosure sale remains intact, even though he is made a party. [NORTONI, J., dissents.] Granite, etc. Co. v. Parkview, etc. Co., 468.

5. **Charter of St. Louis.** The owner against whom a special taxbill for street improvements is issued, pursuant to the Charter of the city of St. Louis, and who is the legal owner of the property at the time the lien of the taxbill attaches, is the only necessary party defendant in a proceeding to enforce such lien; and a suit instituted against such owner within two years after the taxbill matures, as required by section 25 of article 6 of said Charter, will be sufficient to preserve its lien, although parties who are beneficially interested in other liens on the property, prior in time to the lien of the taxbill, or who have become owners of the property by foreclosure of such other liens, are not made parties defendant.
   Held, by NORTONI, J., dissenting, that the beneficiary in a mortgage or deed of trust on the property, the lien of which is prior in time to the lien of the taxbill, is a necessary party defendant, in proceedings to enforce the lien of the taxbill, for the reason he is an "owner" of the property within section 25 of article 6 of said Charter; *held, further*, that the two-year limitation prescribed by said section is not a mere statute of repose, but limits the existence of the lien, so that, unless suit to enforce the lien is instituted against the "owners" within such time, the lien expires and cannot be revivified. Ib.

6. **Enforcement: Parties Defendant: Charter of St. Louis: Definition of "Owner."** The term "owner," in its restricted sense, means the legal owner, and, in its wider sense, any person beneficially interested in the property; and, as used in section 25 of article 6 of the Charter of the city of St. Louis, providing that suit for the enforcement of special taxbills shall be brought in the name of the contractor against the *owners* of the land, it should be given the restricted meaning.
   Held, by NORTONI, J., dissenting, that the beneficiary in a mortgage or deed of trust on the property, the lien of which is prior in time to the lien of the taxbill, is an "owner" within said Charter provisions, and, as such is a necessary party defendant in a suit to enforce the taxbill. Ib.

7. **Parties Defendant: Prior Incumbrancers: Charter of St. Louis: Facts Stated.** At the time of the attaching of the

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SPECIAL TAXBILLS—Continued.

lien of a special taxbill for street improvements, issued pursuant to the Charter of the city of St. Louis, and for a long time prior thereto, certain mortgages, given to secure the holders of various notes or bonds, were outstanding against the property affected by the lien of the taxbill. Suit was brought against the record owner of the property, to enforce the lien of the taxbill, within two years after it matured, as required by section 25 of article 6 of said Charter, but the beneficiaries in said mortgage were not made parties defendant. During the pendency of the suit, the property was sold, under foreclosure of the mortgage, and the purchaser was made a party defendant; but, at that time, more than two years had elapsed from the date the taxbill matured. *Held*, that neither the beneficiaries in the mortgage nor the purchaser at the foreclosure sale were necessary parties defendant, and that the judgment enforcing the lien is, therefore, valid as against said purchaser.

Held, by NORTONI, J., dissenting, that the beneficiaries in the mortgage were necessary parties defendant, and that the lien of the taxbill having become extinguished, under the provisions of section 25 of article 6 of said Charter, by reason of such nonjoinder, the judgment enforcing the lien is erroneous, as against said purchaser. Ib.

8. **Same: Legal Owner.** For the purpose of determining who is the necessary party defendant in a suit to enforce the lien of a special taxbill issued against property for street improvements, the law puts the *onus* on the contractor of ascertaining who is the legal owner of the property, but, prima facie, the owner of record is the legal owner, unless the contractor is aware of an unrecorded conveyance which changes the ownership; the only exception to this rule being change of ownership by descent. Ib.

9. **Enforcement: Parties Defendant: Purchaser at Foreclosure of Prior Incumbrance: Charter of St. Louis.** Where, within the two-years period of limitation prescribed by section 25 of article 6 of the Charter of the city of St. Louis, the purchaser of real estate, under foreclosure of a mortgage was made a party defendant in an action to enforce a special taxbill for street improvements, issued against said real estate pursuant to said charter, after the execution of said mortgage, the fact that the beneficiaries in said mortgage were not made parties defendant would be immaterial even though it were true that they would have been necessary parties had said sale not taken place, since their interest passed to said purchaser, who was made a party defendant; and hence the question of the validity of the lien, notwithstanding the nonjoinder of prior incumbrancers, determined in Granite Bituminous Paving Company v. Parkview Realty and Improvement Company et al. (No. 12563), *ante*, is not in the case. Granite, etc. Co. v. Parkview, etc. Co., 495.

10. **Defenses: Nonconformity to Requirements of Charter of St. Louis: Burden of Proof.** In a suit to enforce a special taxbill for street improvements issued pursuant to the charter of the city of St. Louis, the *onus* of establishing allegations in the answer, that the taxbill was void, for the reason that, although the tract of land, of which the land involved in the suit formed a part, had not been subdivided, it was arbitrarily divided into lots, for the purpose of making the assessment, contrary to the charter provisions, and separate taxbills were issued against such lots, rested on defendant. Ib.

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SPECIAL TAXBILLS—Continued.

11. **Sufficiency of Evidence.** In a suit to enforce a special taxbill for street improvements, issued pursuant to the charter of the city of St. Louis, *held* that a defense pleaded, that the taxbill was void, for the reason that, although the tract of land, of which the land involved in the suit formed a part, had not been subdivided, it was arbitrarily divided into lots, for the purpose of making the assessments, contrary to the charter provisions, and separate taxbills were issued against such lots, was not sustained by the evidence.
[NORTONI, J., dissents solely on the ground stated by him in his dissenting opinion in Granite Bituminous Paving Company v. Parkview Realty and Improvement Company et al. (No. 12563), *ante*; the same questions being involved in this case.] Granite, etc. v. Parkview, etc. Co., 495.

STARE DECISIS.

Controlling Decisions of Supreme Court: Special Taxbills. A decision of the Supreme Court, that the lien of a special taxbill for street improvements is superior to prior incumbrances, is a rule of property, binding on all courts of the State in proceedings involving the same question. Granite, etc. Co. v. Parkview, etc. Co., 468.

STATION

1. **House Tracks: Town: Use by Public: Duty of Railway: Lookout.** Where railway tracks and its station house are located in the midst of a town, with main tracks on one side of the platform and a loading or house track on the other, with open ground or commons adjoining, and the public habitually use the grounds and house track in going to and from the station and beyond it, with knowledge of the company, it becomes its duty to keep a lookout, at a place where he may see for persons who may be on the track. Waite v. Chicago, etc. Co., 160.

2. **Same: Standing Cars on Crossing: Barring Way: Right of Pedestrians: Trespass.** Where a railway company places standing cars on a street crossing and leaves them there, a pedestrian on the street who finds his way barred may go around by crossing over the company's grounds and tracks, and in so doing he is not a trespasser; and if in so doing he is negligently injured or killed by the company's cars, damages may be recovered. Ib.

3. **Same: Avoidance of Obstruction: Adjoining Property: Trespass.** If a temporary obstruction bars the progress of one traversing a public highway, he may avoid it by going over adjoining private fields, or property, without becoming a trespasser. Ib.

4. **Same: Negligence: Humanitarian Rule: Consistency.** There is no inconsistency in the theories of care on the part of plaintiff and negligence of a defendant, and the humanitarian rule embracing contributory negligence of a plaintiff. Cases referred to. Ib.

5. **Statute: Penalty: Compensation.** The statute (Sec. 5425, R. S. 1909) is both penal and compensatory and it is not error against a defendant if an instruction fails to ask for a penalty in addition to compensation. Ib.

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STATION—Continued.

6. **General Instruction: Nondirection: Measure of Damages.** Nondirection in a civil case is not error, and if a plaintiff asks a general instruction on the measure of damages, which defendant thinks should specially set forth the elements and limitations of the damage, it is defendant's duty to ask an instruction to that effect, and if he does not do so he cannot complain of plaintiff's instruction. Ib.

STATUTE OF LIMITATIONS.

1. **Married Women.** Under Sec. 1879, R. S. 1909, the twenty-four year Statute of Limitations begins to run as soon as the cause of action becomes complete whether the party is covert or discovert Graham v. Wilson, 185.

2. **Trusts: Expressed and Resulting.** As to an expressed trust the Statute of Limitations does not begin to run until the trust is denied, but as to trusts arising by operation of law the statute begins to run from the date of the discovery by the *cestui que trust* of the facts constituting the trust. Ib.

STATUTES CITED AND CONSTRUED.

Missouri Constitution.

Article II, Section 10, see page 38.
Article IV, see page 406.

Session Acts.

Laws 1849, p. 426, see page 427.
Laws 1905, pp. 243, 265, 330, see page 156.
Laws 1909, p. 396, see page 136.
Laws 1911, p. 327, see page 242.
Laws 1911, Sec. 12, see page 459.

Revised Statutes of 1855.

Chapter 53, p. 426, see page 427.

Revised Statutes of 1865.

Section 15, 16, see page 413.

Revised Statutes of 1889.

Section 5858, see page 263.
8918, see page 190.
5854, see page 261.

Article 2, Chap. 12, see page 315.

Revised Statutes of 1909.

Section 194, see page 327.
206, see page 327.
219, see page 328.
408, see pages, 406, 412.
409, see page 407.
424, see pages 412, 414.
1751, see page 141.
1804, see page 21.
1879, see page 193.
1881, see page 198.
1924, see page 323.
1974, see page 570.
2012, see page 217.
2022, see pages 119, 530.
2030, see page 15.

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STATUTES CITED AND CONSTRUED—Continued.

Section 2031, see page 15.
2034, see page 15.
2040, see pages 202, 637.
2041, see page 202.
2048, see page 300.
2083, see page 203.
2370, see page 427.
2372, see page 427.
2375, see page 643.
2381, see pages 383, 643, 700.
2887, see page 198.
3039, see pages 38, 633.
3040, see page 37.
3122, see page 522.
3939, see page 136.
4817, see page 347.
5308, see page 300.
5309, see page 300.
5312, see page 299.
5483, see page 205.
6354, see page 188.
6938, see page 506.
Section 6944, see page 264.
7001, see page 296.
7002, see page 289.
7003, see page 289.
7109, see page 313.
7112, see page 313.
7179, see page 482.
7181, see page 482.
7454, see page 273.
7455, see page 274.
7573, see page 34.
8217, see page 343.
8237, see page 344.
8295, see page 110.
8457, see page 708.
8456, see page 709.
8519, see page 357.
9254, see page 281.
9971, see page 155.
10164, see page 156.
10203, see page 250.
11202, see page 412.
11206, see page 413.
11385, see page 491.
11640, see page 132.

STATUTES, CONSTRUCTION OF. See **Mechanics' Liens.**

Maxim. It is a maxim of judicial procedure that where, in construing a law, two conclusions are equally admissible, the one should be adopted that will best carry out the object which the lawgivers sought to reach. Granite, etc. Co v. Parkview, etc. Co., 468.

STREET RAILWAYS. See **Negligence; Personal Injuries.**

1. **Care Required of Persons Operating.** Persons in charge of railroad cars of all kinds must keep a constant and vigilant lookout along the track to prevent injury to persons and property likely to be thereon. This obligation is especially binding when the car's course is over a much traveled street in a city. Windle v. Southwest, etc. Co., 596.

2. ———: **Duty Extends to Discovering Danger.** This duty is not fulfilled by an endeavor to prevent injury after the danger is actually seen; but it is just as incumbent to use such care and diligence in watching for and discovering any probable danger. Ib.

SUICIDE. See **Fraternal Beneficiary Associations.**

SUFFICIENCY OF EVIDENCE. See **Appellate Practice; Attachment; Contracts; Corporations; Damages; Divorce; Fraud and Deceit; Landlord and Tenant; Maintenance; Negligence; Special Taxbills; Verdicts.**

SUPERSEDEAS. See **Appeal and Error.**

TAXBILLS. See **Special Taxbills.**

TENDER. See **Contracts; Life Insurance; Offer of Judgment.**

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TRESPASSERS. See **Carriers of Passengers; Station.**

TRIAL PRACTICE. See **Practice, Trial.**

TRIAL BY COURT.

1. **Instructions: Presumption.** Where a cause is tried by the court without a jury and no instructions are asked to indicate the theory of law entertained by the court, it will be presumed to be a correct one, and if there is any substantial evidence tending to support the finding, the judgment will be affirmed. Sommer v. Bryson, 335.

2. **Its Finding.** The judgment of a trial court should not be disturbed if there is evidence to support it. Hamilton v. Davison, 620.

TRUSTS. See **Equity; Statute of Limitations.**

1. **Personal Property: Donor: Trustee.** A trust in personal property may be created verbally, nor is there any legal objection to the donor making himself the trustee. Citizens National Bank v. McKenna, 254.

2. **Same: Change of Title: Executory.** In order to transfer money from the owner into a condition of trust for another, there must be a present and permanent change of title. It cannot be executory. Mere intention for future consummation is not sufficient. Ib.

3. **Deposit in Bank: Possession.** Where a person deposited money in a bank, taking a certificate of deposit payable "to himself or William McKenna," his nephew, with the statement, frequently made, that it was to be McKenna's if he, the depositor, died or anything happened to him, he keeping possession thereof until his death; it was *held* that this did not create a trust in McKenna's favor, and that the depositor's administrator was entitled to the money. Cases distinguished. Ib.

4. **Terms: Requisites.** Three things must occur to raise a trust: sufficient words to create it, a definite subject and a definite object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared. Taylor v. Welch, 223.

5. **Executory and Executed.** Where the limitations of the trust are fully and perfectly declared, it is regarded as an executed trust; where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his interest is to be carried into effect substantially in the discretion of the trustees, it is an executory trust. Ib.

6. **Same: Consideration.** A promise to create a trust cannot be enforced, if it be unsupported by a valuable consideration, for it is only executory. But if it is executed, the absence of a consideration is immaterial and it may be enforced though voluntary. Ib.

7. **Action for Breach of Contract: Liability of Trust Estate: Forum: Court of Law or Equity.** Trust property cannot be reached in an action at law to recover damages for the breach of an executory contract, and it can be reached only in equity. Markel v. Peck, 358.

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TRUSTS—Continued.

8. **Personal Liability of Trustee: Contract made by Co-trustee.** A minority trustee is not personally liable on a contract which he did not personally make, authorize or adopt, merely because a majority of the trustees authorized it. Markel v. Peck, 358.

9. **Same: Effect of Power Given Majority to Govern.** A provision in a will creating a trust and giving the trustees power to sell or lease the trust estate, that a majority of the trustees shall govern, concerns only the matter of binding the estate and does not render the minority personally liable on contracts made or authorized only by the majority. Ib.

TURNTABLE DOCTRINE. See **Negligence.**

VARIANCE. See **Pleading; Pleading and Proof.**

VENUE. See **Attachment.**

VERDICTS. See **Appellate Practice.**

1. **Reception of.** The only safe way to correct ambiguity in a verdict is for the trial court to have it done before the verdict is received, much safer than to receive it with an ambiguity and then attempt by construction to arrive at the intention of the jury after it has been discharged. Newton v. St. Louis & etc. Co., 199.

2. **Finding of Jury: When Conclusive.** The finding of a jury on any fact, where there is substantial evidence to support it, makes that fact conclusive on the appellate court. Acme, etc. Co. v. Gasperson, 558.

3. **Peremptory Instruction: Issues of Fact for the Jury.** The court should not give a peremptory instruction to find for the plaintiff if there is any evidence in the case, which, if true, would establish any one of the good defenses pleaded in the answer, but the issues should be submitted to the jury. Dyer v. Cowden, 649.

4. **Verdict Directed for Plaintiff: Effect of.** In directing a verdict for the plaintiff the court considers only the evidence favorable to the defendant; admits all of his evidence to be true; gives to his evidence every reasonable intendment and construes in his favor every reasonable inference that can be deduced from his evidence. Ib.

WARRANTY. See **Damages.**

1. **Express and Implied.** Either an express or implied warranty may be the basis of a failure of consideration. Acme, etc. Co. v. Gasperson, 558.

2. **Implied Warranty.** An implied warranty always appertains, in the absence of an express warrant to the same effect or inconsistent therewith, that an article sold for a special purpose is suitable for that purpose. Ib.

3. **Express Warranty: Conditions Precedent.** An express warranty, which imposes conditions precedent, supersedes a like or inconsistent implied warranty and to render it available as

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WARRANTY—Continued.

a defense, performance of conditions precedent thereto annexed must be alleged and proven. Ib.

4. **Breach: Not Necessary to Return Article nor Notify of Defects.** Under an implied contract of warranty the purchaser is not bound to return the property should it fail to meet up the warranty, nor must he give notice of the defect. He may continue to use it in the defective condition without losing his defense. In such a case the defense goes only to a part failure of consideration if the machine is of any value for any purpose or if it may be repaired. Ib.

5. **Warranty: Equivalent Expressions In.** A special warranty on a machine "of doing good and efficient work for which it is intended" is equivalent to the implied warranty to the same effect. Ib.

WARRANTY DEEDS.

1. **Recorded Plat or Map.** Where a lot is deeded by a certain number, which number is one of a legally platted addition to the city, the grantee has a right to rely on getting the full amount of land called for in the recorded plat or map. Jeffords v. Dreisbach, 577.

2. **Covenant of Seisin: When Broken.** When the grantor is not, at the time of making the deed, in possession of part of the property described therein and has no title thereto, his covenant of indefeasible seisin is broken as soon as the deed is made. Ib.

WATERS AND WATER COURSES. **See Injunction.**

WEIGHT OF EVIDENCE. **See Appellate Practice; Carriers of Live Stock; Equity; Trial by Court; Verdicts.**

WIDOW.

1. **Ejectment: Appeal: Injunction.** A person claiming to own land, brought an action of ejectment against persons claiming title in fee simple. Judgment was rendered in favor of the latter and the former appealed to the Supreme Court, and during the pendency of the appeal in that court he died leaving a widow with a right of dower if he was successful in his appeal. The land was chiefly valuable for its growing timber, and the parties in possession began to commit wilful waste by cutting and selling all of it. It was *held* that the widow could maintain a bill to restrain the waste until the case was finally decided. Whitworth v. Barnes, 269.

2. **Same: Injunction.** Where timber growing on land is its chief value, an injunction may be had to restrain its destruction during the pendency of an appeal in another action involving the title, wherein the party in possession obtained a judgment. Ib.

WITNESSES. **See Agency; Evidence; Negligence.**

Evidence. In actions where one of the original parties is dead, the other party to such a contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party claiming under him. Sec. 6354, R. S. 1909. Graham v. Wilson, 185.

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

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contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188—, *executed on the* ——— *day of* ———, 188—;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

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presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

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RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

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RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

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Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ——— 190—, executed on the ——— day of ———, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side-paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

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states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

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RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove.

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

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days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal Is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2043, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st, 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

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from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.
Adopted March 3. 1913.

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